Alison Berry Wilkinson
2023

Principal Attorney
Berry Wilkinson Law Group

Of Counsel
Messing, Adam & Jasmine LLP

With over 30 years experience representing law enforcement officers in civil, criminal, disciplinary, and collective bargaining matters throughout the State of California, Alison has handled a multitude of cutting-edge police cases in federal, state, and administrative proceedings.

Alison also regularly teaches on a variety of law enforcement topics as a certified instructor for the California Commission on Peace Officer Standards and Training (POST), as well as the Alameda County Sheriff's Office Regional Training Center. Additionally, Alison serves as an adjunct professor for Las Positas College Administration of Justice Bureau (2012 to present), as well as the San Jose State University Administration of Justice Bureau (1992-2012), and assisted teaching courses at the Force Science Institute.

After graduating from the University of California at Santa Cruz in 1984, Alison earned her law degree in 1988 from the University of California Hastings College of the Law (now known as UC College of the Law, San Francisco).

The daughter of an elementary school teacher, Alison was born and raised in Palo Alto, California. When she is not defending and prosecuting the rights of public safety employees throughout the state, Alison resides in San Rafael, California with her husband and two children, where she enjoys biking, kayaking, and sailing. She can also be found regularly exploring the natural wonders of Tuolumne County, California, where she enjoys hiking and skiing.

Alison Berry Wilkinson
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CALIFORNIA LAW ENFORCEMENT ACCOUNTABILITY ACT

Effective: January 1, 2023

Penal Code Section 13680:

For purposes of this title, the following terms have the following meanings:

…

(f) "Peace officer" means a person described within Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, who is employed by an agency or department of the state, or any political subdivision thereof, that provides uniformed police services to members of the public including, without limitation, a municipal police department, a county sheriff's department, the California Highway Patrol, the University of California, California State University, or any California Community College police department, and the police department of any school district, transit district, park district, or port authority. "Peace officer" also includes any state or local correctional or custodial officer, and any parole or probation officer.

(g)(1) "Public expression of hate" means any statement or expression to another person, including any statement or expression made in an online forum that is accessible to another person, that explicitly advocates for, explicitly supports, or explicitly threatens to commit genocide or any hate crime or that explicitly advocates for or explicitly supports any hate group.

(h) "Sustained" means a final determination by the investigating agency following an investigation, or, if adverse action is taken, a final determination by a commission, board, hearing officer, or arbitrator, as applicable, following an opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the allegation is true.

Penal Code Section 13682

(a) Notwithstanding Section 19635 of the Government Code, or any other law, any public agency that employs peace officers shall investigate, or cause to be investigated by the appropriate oversight agency, any internal complaint or complaint from a member of the public that alleges, with sufficient particularity to investigate the matter, that a peace officer employed by that agency has in the previous seven years and since 18 years of age, engaged in membership in a hate group, participation in any hate group activity or advocacy of any public expressions of hate.

(b) The agency shall remove from appointment as a peace officer, any peace officer against whom a complaint described in subdivision (a) is sustained.

Column: Does racism make you ‘too stupid to be a cop’? A California law says yes

By Anita ChabriaColumnist April 30, 2023 5 AM PT

Kiora Hansen and Della Currie, from left, protest during a rally at Antioch police headquarters in Antioch, Calif., on April 18. The city council of a small San Francisco Bay Area city voted to launch three audits of its troubled Antioch Police Department, the latest development in a yearlong federal investigation of the police force that blew up this month with the disclosure of racist text messages among officers.

(Jane Tyska / Associated Press)

A few weeks ago, the Contra Costa County district attorney released the results of an investigation that found up to 40% of police officers in Antioch, a Bay Area enclave with a majority of nonwhite residents, were linked to a racist text messaging chain.

Calling Black people "monkeys" and "gorillas" wasn't the worst of it. The messages, spanning over a multiple-year period, used the N-word repeatedly and joked about targeting people based on skin color. They may end up documenting civil rights violations based on race.

Under a new state law, the California Law Enforcement Accountability Reform Act, also known as Assembly Bill 655, such hate speech may be an offense that requires termination — if substantiated.

Many police don't know about the law, said Ed Obayashi, a lawyer and Plumas County sheriff's deputy who advises law enforcement departments statewide on social media misconduct. And most of them, he added, don't understand what its full implications might be.

Obayashi told me he has been trying to get his colleagues to pay attention to the CLEAR Act but hasn't had much luck.

The scandal in Antioch may — finally — get their attention. If the city of Antioch tries to discipline its officers using the

CLEAR Act, it may set a precedent for future cases and curtail our tolerance of hate behind a badge.

The CLEAR Act was written to combat extremism in law enforcement and root out officers who are members of known hate groups. But Obayashi and the bill's author, San Jose Democrat Ash Kalra, contend that six words in the new law that prohibit "advocacy of public expressions of hate" broaden it to include much more than joining up with the Proud Boys or hanging with neo-Nazis. Obayashi believes the intent of the law, which went into effect Jan. 1, is straightforward: "Any racist bias, you are looking at mandatory terminations."

A spokesperson for the state Department of Justice said in an email that the department is working on the specifics of the regulations. Antioch chief of police, Steven A. Ford, didn't respond to an email about the CLEAR Act.

Racist behavior involving law enforcement remains shocking but hardly surprising. Every few months, it seems as if a new disgrace bubbles up like sewage from a broken pipe.

In August, my colleague James Queally reported on one such incident in Torrance when an officer used the N-word while texting another officer about family members who were protesting the shooting of a young Black man, Christopher Deandre Mitchell.

Over the last few years, police and sheriff's departments, including some in San Francisco, Oakland, Berkeley, San Jose, Eureka and Sacramento, have faced similar problems.

And of course, there's Los Angeles County, where deputy gangs in the Sheriff's Department, with their not-so-secret tattoos (a very clear form of communication), have cost the city about $55 million in lawsuits, according to a 2020 report by the Brennan Center for Justice.

Some of those officers were fired. Some were not. Until AB 655, the rules were not explicit and allowed departments to largely impose their chosen discipline. But the CLEAR Act is definitive; if an officer has been found to be in violation, the department has no choice but to fire them.

Like, say, officers repeatedly using racial slurs while on duty patrolling a diverse neighborhood. Those Antioch text messages, even if shared on personal phones, have little expectation of privacy, Obayashi argues. And once public, they can trigger an investigation under the CLEAR Act that can examine everything that officer has said or done in public for seven years.

Obayashi teaches officers that their 1st Amendment rights don't protect them from their obligations as peace officers. Making racist or hateful remarks in any forum — Facebook, Twitter, texts — is bad policing.

“If you do this, I don’t care if you are racist or not, you are too stupid to be a cop,” he said.

Kalra, the bill’s author, told me “the intent was certainly to root out officers that hold the kind of attitudes that officers in Antioch hold.”

The racial slurs, the misogyny, the disdain are all signs of extremism, he said. Even if the officers in the text chain aren’t explicitly in a hate group, their actions are dangerous because of the power they hold.

“It’s definitely extremist views when we consider what the role of a police officer is,” Kalra said.

And for some of the Antioch officers, it looks as though that hatred may have gone beyond words. Some of the texts refer to officers using excessive force or targeting individuals based on race. Along with a federal lawsuit by some Antioch residents targeted in the texts, another Latino couple has filed a lawsuit claiming they were attacked by officers based on their race.

Of course, the officers involved in the Antioch scandal are entitled to due process. Mike Rains, who represents both the Antioch Police Officers’ Assn. and some of the individual officers implicated in the scandal, said he doesn’t believe the CLEAR Act applies to something like a text messaging chain

because it isn't connected to a hate group or a specific hate crime.

"Even if it is abhorrent, even if it has things that sound hateful on its face about a person, about race, I don't think that qualifies in and of itself," he said.

He also believes that the Antioch officers who received the messages but did not actively participate in the texting chain shouldn't be judged in the same manner as those pushing the conversation and that their silent presence shouldn't be interpreted as agreement.

"Those officers are the ones that pay a pretty severe price simply for being on a text chain," Rains said.

Right now, he said, most departments in California don't have rules requiring officers to report biased or racist statements from their colleagues — which seems like something we should demand, just as we insist that officers intervene when they see excessive force.

John Burris, a civil rights attorney representing some Antioch community members in the federal lawsuit, doesn't think passivity is exonerating.

"You get no credit for silence," he said.

How far the CLEAR Act stretches may depend on how far

police chiefs and sheriffs want it to go. If they continue to try to sweep bias under the rug, maybe the law means little. But that old-school approach has become a losing tactic both for leaders who want to keep their jobs, and for those who truly care about bringing a new and different breed of officer into the fold — which many responsible chiefs want to do.

Despite being a decades-long defender of police in courtrooms and in the public sphere, Rains says law enforcement is in trouble when it comes to hiring because of its reputation for bias and misconduct, and can't recruit enough good people. Scandals like Antioch "drag the whole profession down."

Case in point: The homepage for Antioch Police Department is basically a job ad, offering a $30,000 signing bonus.

Departments, especially in California, are under tremendous pressure to reform and rebuild trust with communities that are fed up with biased policing. Alison Berry Wilkinson, a lawyer who often represents officers in disciplinary hearings, said that the CLEAR Act is simply a continuation of a trend she is already seeing of departments no longer being able to tolerate bias.

Like Senate Bill 2, another reform measure that for the first time allows California to decertify officers for serious misconduct so that they can't hold a badge anywhere in the

state, it is the codification of public will.

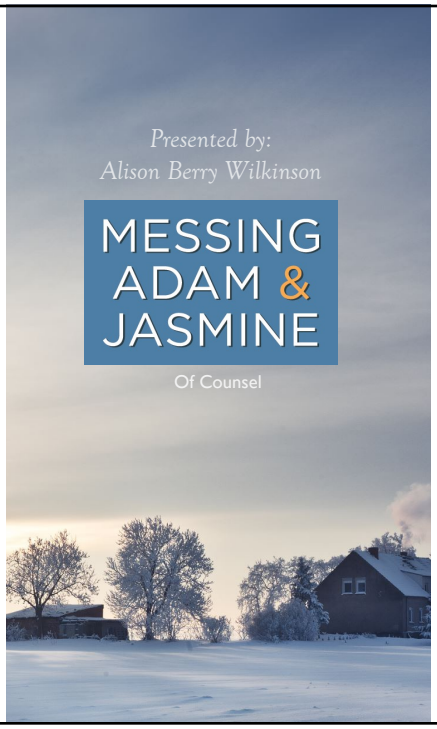
“It’s a clear statement of what’s already going on,” she told me. “Individuals who have these beliefs, who are expressing hate in the manner of those text messages, they do not belong in this industry.”

If law enforcement leaders can use the CLEAR Act to set expectations — and maybe even clean house of an old and ugly way of thinking — then it is a law that should be used to its fullest intent.

Starting in Antioch.

THE TROUBLE WITH TEXTING

(And Other Woes Caused by Modern Communication)



1

ALAMEDA POLICE 1991

Sections

Los Angeles Times

California IN BRIEF : ALAMEDA : Probe of Police Racism Launched

L.A. TIMES ARCHIVES

NOV. 10, 1991 12 AM PT

FROM TIMES STAFF AND WIRE REPORTS

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racist messages on their electronic squad car computers. The officers have been
temporarily suspended. The messages were revealed after an internal audit of the
department was made pu
shooting black people and
police briefings. Outraged
of the officers and the pol

comes in the wake of an investigation that revealed four officers exchanged several racist messages on their electronic squad car computers. The officers have been temporarily suspended. The messages were revealed after an internal audit of the department was made public two weeks ago. Messages included statements about shooting black people and about dressing as Ku Klux Klan members for the daily police briefings. Outraged citizens and civil rights groups have called for the dismissal

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SAN FRANCISCO BAY AREA

2016
The Year Of The Text

LEGAL DEFENSE FUND

The Trouble With Texting

ALISON BERRY WILKINSON
Principal Attorney
Berry Wilkinson Law Group

2016 was the year of the text. Case after case dropped on my desk where casual, colorful, private commentary suddenly became public, causing employers to take disciplinary action. The penalties ranged from termination for the ugliest and most offensive of exchanges, to light suspensions for ill-advised banter.

These cases all shared one similarity: They arose because criminal investigators served a search warrant on a colleague's phone. Half a dozen cases landed on my desk when there was a death in custody at the Santa Clara County jail, resulting in three corrections deputies being investigated for murder. The phones of the co-workers with whom the investigated deputies had been communicating were then warranted. Thankfully, each of the deputies I represented kept their jobs despite their loose texting talk. Others were not so lucky.

The highest profile texting case in the San Francisco Bay Area came out of a federal search warrant for a now convicted former San Francisco police sergeant. The exchanges between that sergeant and some of his co-workers were incendiary, offensive, racist, homophobic and anti-Semitic in nature. Once the U.S. Attorney publicly released the text exchanges, the SFPD moved to terminate several of the most serious offenders. Those officers got lucky — I was able to convince the San Francisco Superior Court to issue an order preventing the Department from disciplining any of the involved officers due to the one-year statute of limitations contained in the Public Safety Officers' Procedural Bill of Rights Act. While it was a rare procedural victory, each of the involved officers' reputations are so tarnished, they likely can no longer operate effectively in their chosen profession.

While a warrant on a colleague's phone may have been the downfall of many in 2016, it is not the only way a private text exchange can come to an employer's attention. Many an officer has been the victim of a spurned lover taking vengeance by turning over their texts to the department. In one case, an officer found himself the subject of an investigation when the ex-girlfriend sent the department a text exchange in which he quipped, "Be prepared — I've got plenty of weed for us to smoke tonight," after a successful drug bust.

A word to the wise: Learn from the mistakes of others. What may seem private and funny at the time can end a career when those texts unexpectedly come to light.

There are many privacy protections for your personal cellphone, but they are not absolute. The strongest protection was a statute enacted this year: Penal Code Section 1546, the California Electronic Communications Privacy Act (CalECPA). Intended to restrict law enforcement's ability to obtain information during criminal investigations, it had the unintended effect of limiting the ability of government employers to secure information from their employees' personal cellphones during misconduct investigations.

With the passage of CalECPA, law enforcement employers can no longer order an employee to turn over his or her personal cellphone as part of an administrative investigation.

The reason: CalECPA provides that a government entity (such as a city, county or state agency employer) shall not do any of the following: 1) compel the production of or access to electronic communication information from a service provider, 2) compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device, and 3) access electronic device information by means of physical interaction or electronic communication with the electronic device (Penal Code Section 1546.1[a][1]-[3]). This means that, absent consent, a search warrant or court order is required to search or access information on any electronic device (e.g., a smartphone or computer) or electronic information on a network (e.g., email).

However, this language does not protect a public employee who has been provided an electronic device by his or her employer, because the statute allows the owner of the electronic device (the entity) to consent, even if the authorized possessor of the device (the employee) does not consent.

Even though we have these new privacy protections regarding your electronic communications, as shown by a myriad of cases this year, your texts can be used against you for disciplinary purposes when the personal cellphone of a colleague is lawfully accessed, or when someone turns those texts over to the department to foster his or her agenda.

The lesson of 2016, therefore, should be to mind your manners when texting. The cost of that spur-of-the-moment, witty remark just might be your career.

About the Author

Alison Berry Wilkinson of the Berry Wilkinson Law Group is dedicated to providing effective, quality representation to public safety employees in civil, criminal, disciplinary and collective bargaining matters. Formerly a partner at Rains, Lucia & Wilkinson, Alison continues to actively and aggressively advocate on behalf of peace officers statewide.

LDF Trustee Meeting

January 6
Sacramento

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The Trouble With Texting

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LDF Trustee Meeting

January 6
Sacramento

THE FIRST AMENDMENT

15

THE EARLY VIEW OF POLICE FREE SPEECH

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

Oliver Wendall Holmes
For the Supreme Court of Massachusetts
McAuliffe v. New Bedford (1892)

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POLICE HAVE LIMITED FREE SPEECH RIGHTS

"[N]o law enforcement agency is required by the First Amendment to permit one of its employees to 'ride with the cops and cheer for the robbers.'"

Dissent of Justice Antonin Scalia

Rankin v. McPherson (1987) 483 U.S 378, 394

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The Philadelphia Inquirer

Court tosses suit from Philly cops who claimed their racist Facebook posts made them victims of discrimination

U.S. District Judge Petrese B. Tucker described the officers as playing "racist bingo" online, mocking as many ethnic groups as possible, and upheld the city's decision to punish them.

A federal judge has dismissed a civil rights lawsuit brought by 12 current and former Philadelphia police officers who were suspended or lost their jobs over racist, demeaning, or violent posts they made to their personal Facebook accounts.

U.S. District Judge Petrese B. Tucker ruled that the posts clearly violated the Police Department's social media policy and she rejected the idea that by disciplining the officers, the city had infringed upon their First Amendment rights.

She noted that the city's interest in safeguarding public confidence in its police force outweighed the rights of individual officers to use ethnic slurs and other discriminatory speech online.

"African Americans, Muslims, Mexicans and foreign refugees were not spared, as [these officers] played racist bingo, mocking as many ethnic or religious groups as possible," Tucker wrote in an opinion issued last week.

Their posts, she added, "betrayed hard earned public trust, especially in a climate where police are held to a higher standard, especially in the face of increasing public scrutiny."

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LESSONS FROM THE TRENCHES

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POLICE SPEECH IS HIGHLY REGULATED

Insubordination

- Disparaging remarks or conduct concerning duly constituted authority to the extent that such conduct disrupts the efficiency of this department or subverts the good order, efficiency and discipline of this department or that would tend to discredit any of its members

Dissemination of Confidential Materials

- Texting gruesome images or trophy photos
- Leaks to the media or press

Conduct Unbecoming

- Failure of Good Behavior

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IT'S FUNNY, UNTIL IT'S NOT

Exclusive: Buffalo police officer defends 'Angry Cops' videos that got him suspended

Jason Silverstein

NEW YORK DAILY NEWS |

Feb 23, 2016 at 12:47 PM

"I just thought it was harmless fun," Buffalo Police Officer Richard Hy said.

A Buffalo police officer was suspended Monday for creating a series of videos making light of police duty, including jokes about prison rape, stealing evidence and shooting civilians.

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THINK BEFORE YOU POST

22

Detective On Administrative Leave After Facebook Rant

On Aug 05, 2014 03:18 pm

MARLIN, TX – A Marlin police detective is under investigation and has been put on administrative leave after allegedly posting a rant on Facebook, Marlin Police Chief Darrell Allen said Monday.

Fletcher said Douglas may have violated the city's policy regarding appropriate online publishing, but the situation is still under investigation.

The policy warns against discrediting the credibility of the department with "statements or other forms of speech that ridicule, malign, disparage or otherwise express bias against any race, any religion, or any other protected class of individuals."

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TEXTS DON'T CONVEY TONE OR HUMOR

"I know you think you understand what you thought you heard me say. But what you think you heard me say isn't what I really meant." –Unknown

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APPLY THE BULLHORN TEST

(a.k.a. think before you act)

"At the time you think it's hilarious, and you don't think about what you are doing," Murdoch said recently. "Think twice with all your decisions."

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NOTHING IS SACRED *(or private)*

Screenshots are Easy to Take

"I'm sure [the GPD supervisors] wouldn't like our text conversations either lol," White wrote in one message on March 5, 2021. "Let's keep this between us. I don't want to hurt your case."

THE KANSAS CITY STAR.

A former Gardner police officer was stripped of his law enforcement certification this month after investigators concluded he had an inappropriate relationship with a victim in a domestic violence case he investigated and then lied about it to his superiors.

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AND, IT'S NOT JUST COPS

U.S. NEWS

Reprimand of judges for social media misconduct warrants updated guidelines, experts say

After a spate of reports of judges using social media in partisan and inappropriate ways, observers say states should revisit their guidelines and give more clarity.

- A circuit court judge in Tennessee was publicly reprimanded in October – and narrowly dodged a 30-day suspension – after admitting to sending multiple women flirtatious and sexual messages through social media from an account that featured a picture of him in his judicial robe.

That same month, a domestic relations judge in Alabama was temporarily removed from the bench after state judicial investigators accused her or someone on her behalf of using fake Facebook accounts to harass litigants who had cases in her court.

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THE WHOLE WORLD IS WATCHING

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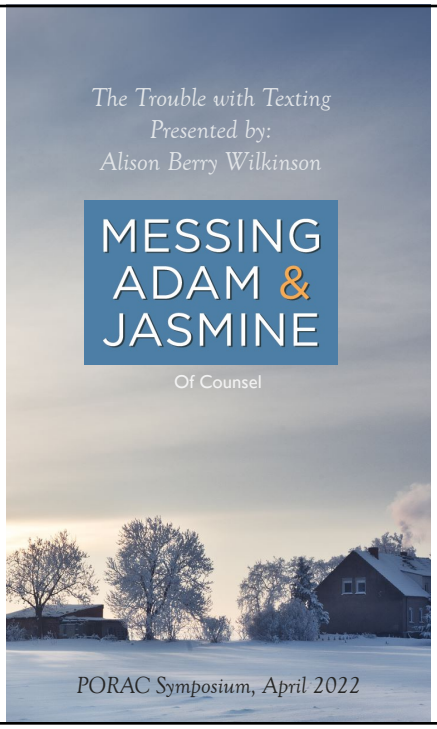

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Alison Berry Wilkinson
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Free Speech Rights of Public Employees
April 2003 Update

SYMBOLIC SPEECH

NEW LAWS PROTECT OFFICERS WHO DISPLAY AMERICAN FLAGS AND WEAR FLAG PINS ON-DUTY

On April 1, 2003, the San Francisco Chronicle published an article that headlined: "*Boss Orders Cops to Hide Flag Scarfs – Some Officers Wore Bandanas Under Helmets at War Protests."* The acting police chief, Alex Fagan, made the order after he saw photographs of five officers who had taken off their helmets during a protest, displaying the colors underneath. "We're not making a big issue of it," he said. "It's not going to happen again. If they are wearing those bandannas, they should keep their helmets on."

Protections for Symbolic Speech

Symbolic speech is a type of nonverbal communication that takes the form of an action in order to communicate a specific belief. If an action makes a political statement without the use of words, it falls under symbolic speech. The most common examples of symbolic speech are:

- Wearing armbands/clothing
- Silently protesting
- Flag burning
- Marching

Symbolic speech is protected under the First Amendment, but there are some caveats: unlike traditional forms of speech, it may be regulated.

In a 1968 case involving the burning of a draft card, the United States Supreme Court set the standard for regulating symbolic speech. (*Waters v. O'Brien*, 391 U.S. 367 (1968).) The regulation must:

- Further an important or substantial governmental interest;
- Be unrelated to the suppression of free expression; and
- Any incidental restriction on alleged First Amendment freedom must be no greater than is essential to furtherance of that interest.

New Statutes Protect the Wearing of American Flag Pins

In the aftermath of 9/11, some police officers began wearing flag pins and other patriotic decorations to show support for the New York City officers who died in the tragedy, as well as for the country, in general. Many officers were told to remove the pins because they violated departmental uniform regulations.

The California Legislature stepped into action, and protected the ability of public safety officers to display American flag pins

while on-duty. These new laws went into effect on January 1, 2003:

Government Code section 434.5 was amended to prohibit a local government agency from adopting "any policy or regulation that prohibits or restricts and employee of that agency from displaying a Flag of the United States, or a pin of that flag, on his or her person, in his or her workplace, or on a local government agency vehicle operated by that employee." While the agency can impose "reasonable restrictions as to the time, place and manner of placement or display" of an American flag, it can only do so "when necessary for the preservation of the order or discipline of the workplace." No restrictions can be imposed "solely to promote aesthetic considerations."

Government Code section 3312 was added to prohibit employers from taking any punitive action against any public safety officer who wears a flag pin or displays any other item containing the American flag, *unless* the employer gives the officer written notice that includes *all* of the following:

a. A statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag;

b. A citation to the specific rule, regulation, or policy or local agency agreement or contract that the pin or other item violates; and

c. A statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to applicable grievance or appeal procedures adopted by the department or public agency.

Please contact the firm for information about how these and other important workplace rights might apply to your specific work environment.

The Berry Wilkinson Law group is dedicated to providing effective, quality representation to public safety employees in civil, criminal, disciplinary, and collective bargaining matters.

The firm provides this Newsletter in an on-going effort to keep clients and friends updated on current legal developments, news stories, and other relevant information.

This newsletter is for general information purposes only. Action should not be taken on the information contained herein without seeking more specific legal advice on the application and interpretation to any particular situation.

Alison Berry Wilkinson
alison@berrywilkinson.com

NEW LAWS AFFECTING POLICE DISCIPLINE FOR SPEECH DEMONSTRATING BIAS

SENATE BILL 1421 / SENATE BILL 16

Sustained Allegations of Bias/Discrimination Are Subject to Public Records Act Disclosure

Penal Code Section 832.7(b)(1):

[T]he following peace officer or custodial officer personnel records and records maintained by a state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code):

…

(C) *Any record relating to an incident in which a sustained finding was made* by any law enforcement agency or oversight agency *involving dishonesty* by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer*, including, but not limited to, any false statements*, filing false reports, destruction, falsifying, or concealing of evidence, or perjury.

(D) *Any record relating to an incident in which a sustained finding was made* by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in conduct *including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person* on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

(Emphasis added)

Penal Code section 832.8(b):

"Sustained" means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy.

Senate Bill 1421 / Senate Bill 16 and Internal Affairs Investigations

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"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient of policeman."

U.S. Supreme Court Justice Louis Brandeis (1856-1941)

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Historical Perspective

1968	Public Records Act Enacted
1974	*Pitchess v. Superior Court*
1978	Legislative Tradeoff - Penal Code sections 832.5, 832.7
2006-2008	Public Police Misconduct Hearings Prohibited
2015	Renewed calls for legislative change

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January 1, 2019

SB 1421	Amended Penal Code sections 832.7 and 832.8 to make certain categories of records presumptively public

Records related to the report, investigation, or findings regarding:

- An officer's discharge of a firearm at a person
- Any use of force that results in death or great bodily injury

Records related to a ***sustained finding*** that an officer engaged in:

- *Sexual assault* involving a member of the public

Records related to a ***sustained dishonesty finding*** concerning:

- The reporting, investigation, or prosecution of a crime
- The reporting or investigation of a misconduct investigation
- Including, but not limited to any finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence

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"Sustained" means a "final determination" the actions "were found to violate law or department policy" following "an investigation and opportunity for administrative appeal"

Penal Code section 832.8(b)

Completion of the appeal is not required.

Collondrez v. City of Rio Vista (2021) 61 Cal.App.5th 1039

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January 1, 2022

SB 16	Amended Penal Code sections 832.7 and 832.8 to make **additional** categories of records presumptively public

Records related to *sustained findings* of:

- Unreasonable or excessive force
- Failure to intervene in a clearly unreasonable or excessive use of force
- Unlawful arrest
- Unlawful search

Records related to any incident resulting in *sustained findings* of:

- Conduct revealing prejudice or discrimination
- Including in verbal statements, writings, online posts, recordings and gestures

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SB 16 also expanded disclosure from simply sustained findings following "an investigation and opportunity for administrative appeal" to include records involving an officer who resigned before the investigation was concluded

Penal Code section 832.7(b)(3)

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FIRST AMENDMENT UPDATE:
Police Union Activities Protected Under the First Amendment

Ellins v. City of Sierra Madre, 710 F.3d 1049 (9th Cir. 2013)

By Alison Berry Wilkinson

John Ellins, a police officer for the City of Sierra Madre and then-president of the Sierra Madre Police Officers' Association, led a union membership vote that resulted in a finding of "no confidence" in the police chief. Shortly thereafter, the police chief delayed signing a certificate that would have entitled Ellins to a 5% salary increase. Ellins sued the City and the Chief in federal court, alleging that the delay in signing the certificate was unconstitutional retaliation for exercising his First Amendment right to lead the no confidence vote.

Using *Garcetti v. Ceballos*, 547 U.S. 410 (2006) as its guide, the district court granted a 12(b)(6) motion to dismiss after it concluded the First Amendment did not protect the the police association president's actions because they were taken pursuant to his official duties, not as a private citizen.

The Ninth Circuit reversed, finding that a jury could determine that Ellis spoke as a private citizen on a matter of public concern since Ellins' duties as a police officer did not require him to become the union president or engage in union activities. The court took the extra step of analyzing the law in other circuits where comments made by a police officer acting in his capacity as union representative were considered spoken as a private citizen rather than pursuant to his official duties. (See, *Fuerst v. Clarke*, 454 F. 3d 770 (7th Cir. 2006); *Baumann v. District of Columbia*, 744 F. Supp. 2d 216, 224 (D.D.C. 2010); *Hawkins v. Boone*, 786 F. Supp. 2d 328, 338 (D.D.C. 2011). The court ultimately found:

> Given the inherent institutional conflict of interest between an employer and its employees' union, we conclude that a police officer does not act in furtherance of his public duties when speaking as a representative of the police union.

Ellins v. City of Sierra Madre, supra, 710 F.3d at 1060.

The court further concluded the police association president's comments on the no-confidence vote were on a matter of public concern (not a private grievance) because it concerned department-wide problems based on the Chief's "perceived lack of leadership, wasting of citizens' tax dollars, hypocrisy, expensive paranoia, and damaging inability to conduct her job." *Id.* at 1057-1058. The court emphasized that *collective* rather than *individual* grievances may be matters of public concern. *Ibid.*, citing *Lambert v. Richard*, 59 F. 3d 134, 136-37 (9th Cir. 1995), and *McKinley v. City of Eloy*, 705 F. 2d 1110, 1114 (9th Cir. 1983). The court further concluded the speech was on a matter of public concerns because the departmental problems could affect the ability of the Sierra Madre police force to attract and retain officers.