LABOR AND EMPLOYMENT LAW

CALIFORNIA LAWYERS ASSOCIATION

presents

2024 Public Sector Conference

In One Year and Out The Other: Year In Review

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Speakers:

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Conference Reference Materials

THE YEAR IN REVIEW – APRIL 2023 TO APRIL 2024

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[1] Ms. Steele would like to thank her colleagues Ardalan Raghian, Ailyn Gonzalez, Katie McDonagh, Teresa Rojas, Aaron Nathan, Muey Saetan and Stephanie Mizuhara for their contributions to these materials.

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NEW LEGISLATION

AB 1 - Legislature Employer-Employee Relations Act (LEERA) (Effective July 1, 2026)

The Ralph C. Dills Act (Dills Act) governs collective bargaining between the state and recognized state public employee organizations but does not cover the Legislature and legislative employees. This law creates the Legislature Employer-Employee Relations Act (LEERA), which gives certain specified categories of legislative employees the right to unionize. LEERA largely tracks the Dills Act with some exceptions regarding excluded employees and specified exclusions to the scope of representation.

The law gives exclusive jurisdiction to the Public Employment Relations Board to enforce LEERA. However, the law prohibits the Board from issuing a decision or order that intrudes upon or interferes with the Legislature's core function of efficient and effective lawmaking or the essential operation of the Legislature.

AB 96 - Public Transit Employers; Autonomous Vehicle Tech; Bargaining (Effective January 1, 2024)

At least ten (10) months before beginning a procurement process to acquire or deploy any autonomous transit vehicle technology for public transit services that would eliminate job functions or jobs of the workforce, a public transit employer shall notify, in writing, the exclusive employee representative of the workforce affected by the autonomous transit vehicle technology of its determination to begin that procurement process. A "public transit employer" means any local governmental agency, including any city, county, city and county, special district, transit district, or joint powers authority, that provides public transit services within the state.

Upon a written request by the exclusive employee representative, the public transit employer and exclusive employee representative shall commence collective bargaining within specified timelines over the following subjects:

(1) Developing the new autonomous transit vehicle technology.
(2) Implementing the new autonomous transit vehicle technology.

(3) Creating a transition plan for affected workers.
(4) Creating plans to train and prepare the affected workforce to fill new positions created by a new autonomous transit vehicle technology.

The Public Employment Relations Board (PERB) shall have jurisdiction to process unfair practice charges alleging violations of this chapter, but only as to transit district employers where the Board has jurisdiction to process unfair practice charges.

AB 520 - Joint Liability; Unpaid Wages (Effective January 1, 2024)

Under existing law, Labor Code section 238.5, a private business that contracts for property services is jointly liable for the wage theft violations of the service contractor where the individual or business entity has been provided notice, by any party, of any proceeding or investigation by the Labor Commissioner in which the employer is found liable for those unpaid wages. This law extends joint liability to any public entity, defined as a city, county, city and county, district, public authority, public agency, and any other political subdivision or public corporation in the state, but does not include the state.

AB 933 - Expands Defamation Protections for Claims of Sexual Harassment, Discrimination, And Retaliation (Effective January 1, 2024)

Existing law, Civil Code section 47, provides that libel is a false and unprivileged written publication that injures the reputation, and that slander is a false and unprivileged publication, orally uttered, that injures the reputation, as specified. Existing law makes certain publications and communications privileged, and therefore, protected from civil action, including complaints of sexual harassment by an employee, without malice, to an employer based on credible evidence and communications between the employer and interested persons regarding a complaint of sexual harassment.

This law adds as a privileged communication, any communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination, as defined, and would specify the attorneys' fees and damages available to a prevailing defendant in any defamation action brought against that defendant for making that communication.

AB 1457- Eligibility Workers (Effective January 1, 2024)

Existing law requires that any decisions governing eligibility for the Medi-Cal program, the California Work Opportunity and Responsibility to Kids (CalWORKs) program, or the CalFresh program that are made by a county pursuant to provisions relating to public social services be made exclusively by a merit or civil service employee of the county.

This law adds the California Food Assistance Program (CFAP), Cash Assistance Program for Immigrants (CAPI), In-Home Supportive Services (IHSS), and Adult Protective Services (APS) program to the list of programs for which any decisions governing eligibility that are made by a county must be made exclusively by a merit or civil service employee of the county.

AB 1484 - Temporary Employees in Bargaining Units (Effective January 1, 2024)

AB 1484 applies to California local government employers covered by the Meyers-Milias-Brown Act (MMBA), including cities, counties, and special districts. The requirements of AB 1484 are triggered where temporary public employees have been hired to complete the same or similar work that is performed by union-represented permanent employees. Upon request of the union, the new bill requires those temporary employees to be automatically included in the same bargaining unit as the permanent employees upon hire if the requested classification of temporary employees is not presently within the unit. No additional procedures are necessary for the union to begin to represent the temporary employees. If the union already represents the temporary employees in a separate unit, this bill enables the union to add the temporary employees to a different existing unit that includes permanent employees (i.e., the union can merge its two units into one). Additionally, upon request of the union, public employers are required to bargain regarding wages, hours, and other terms of employment for the temporary employees. If the labor contract is currently closed, the parties should include any terms they negotiate relating to temporary employees in an addendum. When the labor contract is open, they can move the terms into the main body of the labor contract. The bill outlines several important employment conditions that an employer must bargain with a union, for instance, seniority credits and hiring preferences for temporary employees applying for permanent positions.

Furthermore, when public employers hire new temporary employees, they must provide the worker and the union with the applicable job description, wage rates, benefits summary, anticipated length of employment, and procedures to apply for open permanent positions.

The public employers must include in their "A.B. 119 report" (the contact information report it provides periodically to the union per Government Code section 3558), the anticipated end date or actual end date of temporary employees.

PERB has unfair practice jurisdiction to resolve disputes arising under this legislation.

SB 428 – Temporary Restraining Orders; Employee Harassment (Effective January 1, 2025) (*See also* SB 553)

Existing law, Code of Civil Procedure section 527.8, authorizes any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual that can reasonably be construed to be carried out or to have been carried out at the workplace, to seek a temporary restraining order and an injunction on behalf of the employee and other employees of the employer.

This law would additionally authorize any employer whose employee has suffered harassment, as defined, to seek a temporary restraining order and an injunction on behalf of the employee and other employees upon a showing of clear and convincing evidence that an employee has suffered harassment, that great or irreparable harm would result to an employee, and that the respondent's course of conduct served no legitimate purpose.

This law would also require an employer seeking such a temporary restraining order to provide the employee whose protection is sought the opportunity to decline to be named in the order before the filing of the petition. The bill would expressly prohibit a court from issuing such an order to the extent that the order would prohibit speech or activities protected by the federal National Labor Relations Act or specified provisions of law governing the communications of exclusive representatives of public employees.

SB 497 – Protected Employee Conduct (Effective January 1, 2024)

Existing law, Labor Code section 98.6 prohibits a person from discharging an employee or in any manner discriminating, retaliating, or taking any adverse action against any employee or applicant for employment because the employee or applicant engaged in protected conduct, as specified. This law creates a rebuttable presumption in favor of the employee's claim if an employer engages in any action prohibited by this provision within 90 days of the protected activity specified in this provision.

Existing law, Labor Code section 1102.5, prohibits whistleblower retaliation and provides for a penalty not to exceed $10,000 per violation against corporations and LLC's. This law makes the penalty not to exceed $10,000 per employee and provides that payment be made to the employee. This law also removes the limitation that the penalty can only be assessed against corporations and LLC's.

SB 525 - Minimum Wage for Healthcare Workers (Effective January 1, 2024)

This law establishes five (5) separate minimum wage schedules for covered health care employees, as defined, depending on the nature of the employer. The minimum wage schedules can be found at Labor Code section 1182.14. "Covered health care facility" includes licensed general acute care hospitals and psychiatric hospitals as defined by Health and Safety Code section 1250. It also includes county correctional facilities that provide health care services and county mental health facilities. However, the definition of "covered health care employees" excludes "any work performed in the public sector where the primary duties performed are not health care services."

SB 553 – Occupational Safety; Workplace Violence (Portions Effective July 1, 2024 and January 1, 2025)

Existing law, Code of Civil Procedure section 527.8, authorizes any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual that can reasonably be construed to be carried out or to have been carried out at the workplace, to seek a temporary restraining order and an injunction on behalf of the employee and other employees of the employer.

This law, commencing January 1, 2025, authorizes a collective bargaining representative of an employee to seek a temporary restraining order and an order after hearing on behalf of the employee and other employees at the workplace. The law requires an employer or collective bargaining representative of an employee, before filing such a petition, to provide the employee who has suffered unlawful violence or a credible threat of violence from any individual an opportunity to decline to be named in the temporary restraining order.

Existing law, the California Occupational Safety and Health Act of 1973, imposes safety responsibilities on employers and employees, including the requirement that an employer establish, implement, and maintain an effective injury prevention program, and makes specified violations of these provisions a crime. This law requires an employer, as specified, to also establish, implement, and maintain, at all times in all work areas, an effective workplace violence prevention plan containing specified information. This law requires the employer to record information in a violent incident log for every workplace violence incident, as specified. The law requires the employer to provide effective training to employees on the workplace violence prevention plan, among other things, and provide additional training when a new or previously unrecognized workplace violence hazard has been identified, and when changes are made to the plan. The law requires records of workplace violence hazard identification, evaluation, and correction and training records to be created and maintained, and violent incident logs and workplace incident investigation records to be maintained, as specified. These requirements become operative on and after July 1, 2024.

This law incorporates additional changes to Section 527.8 of the Code of Civil Procedure added by SB 428.

SB 616 – Paid Sick Days Accrual and Use (Effective January 1, 2024)

Existing law, the Healthy Workplaces, Healthy Families Act of 2014, establishes requirements relating to paid sick days and paid sick leave. Existing law excludes specified employees from its provisions, including an employee covered by a valid collective bargaining

agreement, as described (CBA employees). Existing law requires paid sick leave to be accrued at a rate of no less than one (1) hour for every thirty (30) hours worked, and to be available for use beginning on the 90th day of employment. This law extends the above-described procedural requirements on the use of paid sick days to CBA employees.

Existing law authorizes an employer to use a different accrual method as long as an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12-month period. Existing law also provides that an employer may satisfy the accrual requirements by providing not less than 24 hours or three (3) days of paid sick leave that is available to the employee to use by the completion of the employee's 120th calendar day of employment.

This bill modifies the employer's alternate sick leave accrual method to additionally require that an employee have no less than 40 hours of accrued sick leave or paid time off by the 200th calendar day of employment or each calendar year, or in each 12-month period. The law modifies that satisfaction provision to authorize an employer to satisfy accrual requirements by providing, in addition to the existing criteria for satisfaction above, not less than 40 hours or five (5) days of paid sick leave that is available to the employee to use by the completion of the employee's 200th calendar day of employment.

Existing law requires accrued paid sick days to carry over to the following year of employment. Existing law, however, authorizes an employer to limit an employee's use of accrued paid sick days to 24 hours or three (3) days in each year of employment, calendar year, or 12-month period. Under existing law, this provision is satisfied, and no accrual or carryover is required if the full amount of leave is received at the beginning of each year of employment, calendar year, or 12-month period. Existing law defines "full amount of leave" for these purposes to mean three (3) days or 24 hours.

This law raises the employer's authorized limitation on the use of carryover sick leave to 40 hours or five (5) days in each year of employment. The law would redefine "full amount of leave" to mean five (5) days or 40 hours.

Existing law also entitles individual providers of in-home supportive services and waiver personal care services, as defined, to paid sick days in specified amounts in accordance with minimum wage increases, up to a maximum of 24 hours or three (3) days each year of employment when the minimum wage has reached $15 per hour. Existing law authorizes the State Department of Social Services to implement and interpret these provisions. This law increases the sick leave accrual rate for these providers to 40 hours or five (5) days in each year of employment, beginning January 1, 2024.

Under existing law, an employer is not required to provide additional paid sick days pursuant to these provisions if the employer has a paid leave or paid time off policy, makes an amount of leave available to employees that may be used for the same purposes and under the same conditions as these provisions, and the policy satisfies one of specified conditions. Under that law, one of those conditions requires the employer to have provided paid sick leave or paid time off in a manner that results in an employee's eligibility to earn at least three (3) days or 24 hours of sick leave or paid time off within nine (9) months of employment. This law changes that condition so that the employee must be eligible to earn at least five (5) days or 40 hours of sick leave or paid time off within six (6) months of employment.

Under existing law, an employer has no obligation under these provisions to allow an employee's total accrual of paid sick leave to exceed 48 hours or six (6) days, provided that an employee's rights to accrue and use paid sick leave are not otherwise limited, as specified. This law increases those accrual thresholds for paid sick leave to 80 hours or ten (10) days.

Existing paid sick days law sets forth provisions on, among other things, compensation for accrued, unused paid sick days upon specified employment events, the lending of paid sick days to employees, written notice requirements, the calculation of paid sick leave, reasonable advance notification requirements, and payment of sick leave taken. This law provides that these provisions shall preempt any local ordinance to the contrary.

The law includes findings that the changes proposed by this law address a matter of statewide concern rather than a municipal affair and, therefore, apply to all cities, including charter cities.

SB 700 – Employment Discrimination; Cannabis Use (Effective January 1, 2024)

Existing law, the California Fair Employment and Housing Act, prohibits various forms of employment discrimination and empowers the Civil Rights Department to investigate and prosecute complaints alleging unlawful practices. Existing law, Government Code section 12954, makes it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person because of the person's use of cannabis off the job and away from the workplace, except as specified.

This law makes it unlawful for an employer to request information from an applicant for employment relating to the applicant's prior use of cannabis, as specified. Under this law, information about a person's prior cannabis use obtained from the person's criminal history would be exempt from the above-described existing law and bill provisions relating to prior cannabis use if the employer is permitted to consider or inquire about that information under a specified provision of the California Fair Employment and Housing Act or other state or federal law.

SB 848 – Employment; Leave for Reproductive Loss (Effective January 1, 2024)

Existing law, the California Fair Employment and Housing Act, makes it an unlawful employment practice for an employer to refuse to grant a request by any employee to take up to five (5) days of bereavement leave upon the death of a family member.

This law additionally makes it an unlawful employment practice for an employer to refuse to grant a request by an eligible employee to take up to five (5) days of reproductive loss leave following a "reproductive loss event" which is defined as "the day or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction." This law requires that leave be taken within three (3)

months of the event and pursuant to any existing leave policy of the employer. If an employee experiences more than one reproductive loss event within a 12-month period, the employer is not obligated to grant a total amount of reproductive loss leave time in excess of 20 days within a 12-month period. In the absence of an existing policy, the reproductive loss leave may be unpaid. However, the law authorizes an employee to use certain other leave balances otherwise available to the employee, including accrued and available paid sick leave.

Minimum Wage and Salary Increase (Effective January 1, 2024)

Although not a new law, California's minimum wage increased to $16.00 per hour for all employers, regardless of the number of employees. Because the minimum salary threshold for exempt employees is defined as a multiple of the state minimum wage, the 2023 minimum salary threshold that must be paid to an exempt employee is $66,560 annually.

CASE LAW

Title VII/FEHA/ADA

Vines v. O'Reilly Auto Enterprises (2024) __ Cal.Rptr.3d __; 2024 WL 1751760 (April 24, 2024)

The issue in this case is whether interest on an attorneys' fees award runs from the first, later-reversed attorneys' fees order or the second, post-remand attorneys' fees order. In the underlying case, Plaintiff sued his former employer, O'Reilly Auto Enterprises, LLC, for violations of the Fair Employment and Housing Act (FEHA) (Government Code section 12900 et seq.), alleging causes of action for race- and age-based discrimination, harassment, and retaliation. A jury found in his favor on his causes of action for retaliation and failure to prevent retaliation, but against him on his other causes of action. Although Plaintiff asked for $253,417 in economic damages and $1.3 million to $2.3 million in non-economic damages, the jury awarded him only $70,200.

Plaintiff then moved for $809,681.25 in statutory attorneys' fees. On September 9, 2019, the trial court granted the motion, but awarded only $129,540.44 in fees, based in part on the court's determination Plaintiff's unsuccessful discrimination and harassment causes of action

were not closely related to or factually intertwined with his successful retaliation causes of action. Plaintiff appealed, and the court of appeal reversed. The court held the trial court erred in finding that, because the facts related to Plaintiff's (successful) retaliation causes of action arose after he complained about the discriminatory and harassing conduct, the (unsuccessful) discrimination and harassment causes of action were not related to the (successful) retaliation causes of action. Therefore, the court concluded, the trial court erred in ruling Plaintiff was not entitled to recover any fees he incurred pursuing his discrimination and harassment causes of action. (*See Vines v. O'Reilly Auto Enterprises, LLC* (2022) 74 Cal.App.5th 174, 185.

On remand, on June 29, 2022, the trial court awarded Plaintiff $518,161.77 in fees. O'Reilly paid the fee award, including post-judgment interest from June 29, 2022. Plaintiff's attorneys, however, wanted more; specifically, they wanted interest on the attorneys' fees award from September 9, 2019, not June 29, 2022, which amounted to an additional $138,454.44 in interest. The court noted that rather than asking the court to enter an amended judgment that included the award of attorneys' fees plus additional interest or seeking an order for additional interest, Plaintiff applied for and obtained a renewal of the judgment in the amount of $138,454.44 (i.e., the additional interest). O'Reilly then filed a motion to vacate the renewal of judgment, which the trial court denied.

In its decision, the court noted that, "A judgment bears interest from the date of its entry in the trial court, even though it is still subject to direct attack." Relevant to this case, the court held that, "When a judgment is modified upon appeal, whether upward or downward, the new sum draws interest from the date of entry of the original order, not from the date of the new judgment. [Citations.] On the other hand, when a judgment is reversed on appeal the new award subsequently entered by the trial court can bear interest only from the date of entry of such new judgment." "Whether an appellate court's disposition is a modification or a reversal depends on the substance and effect of the order, not its form."

Here, the court held in the first appeal that the trial court's ruling was legal error because evidence of the discriminatory and harassing conduct Plaintiff claimed he experienced was

relevant to prove he reasonably believed that conduct was unlawful, an element of his retaliation causes of action. The court held that because the effect of its first opinion was to remand the case to the trial court for further hearing and factfinding to determine an appropriate fee award, that decision was a reversal, not a modification. Accordingly, the court reversed the renewal of judgment.

Snoeck v. ExakTime Innovations, Inc. (2023) 96 Cal.App.5th 908, reh'g denied (October 25, 2023), review denied (January 24, 2024)

A former employee brought an action against ExakTime Innovations, Inc. (ExakTime) for disability discrimination under FEHA and related causes. The jury awarded the former employee $130,088 in damages for ExakTime's failure to engage in a good faith interactive process. In October 2019, the trial court denied the former employee's motions for judgment notwithstanding the verdict and for a new trial. The former employee appealed, and the court of appeal affirmed the verdict.

Following the court of appeal's decision, denial of the former employee's petition for rehearing, and the California Supreme Court's denial of the former employee's petition of review and request for publication, the employee moved for $2,089,272.50 in attorneys' fees. The superior court granted the motion in part and awarded the former employee $686,795.62 in attorneys' fees. The trial court calculated the fee award by applying a twenty percent (20%) "across the board reduction" in response to billing concerns raised by ExakTime, applying a 1.2 multiplier to account for interest for the years spent working on the case without pay, and lastly, applying a 0.4 negative multiplier to its $1,144,659.36 adjusted lodestar calculation "to account for [p]laintiff's counsel's ... lack of civility throughout the entire course" of the litigation. The former employee appealed.

The court of appeal affirmed the trial court's order awarding attorneys' fees and found that "a trial court may consider an attorney's pervasive incivility in determining the reasonableness of the requested fees. A court may apply, in its discretion, a positive or negative multiplier to adjust the lodestar calculation—a reasonable rate times a reasonable number of

hours—to account for various factors, including attorney skill." The court of appeal affirmed the reduction finding that the record "amply supports the trial court's finding that plaintiff's counsel was repeatedly, and apparently intentionally, uncivil to defense counsel—and to the court—throughout this litigation."

Argueta v. Worldwide Flight Services, Inc. (2023) 97 Cal.App.5th 822, reh'g denied (December 6, 2023), review denied (March 20, 2024)

A former employee filed an action against Worldwide Flight Services, Inc. ("Worldwide") alleging sexual harassment, retaliation, and a hostile work environment in violation of FEHA. The jury found for Worldwide and the former employee filed a motion for a new trial in part based on the trial court's error in admitting employee complaints against the former employee and a motion for judgment notwithstanding the verdict. The trial court denied both motions. The former employee appealed.

The court of appeal found that the former employee was entitled to a new trial as the potential for undue prejudice far outweighed the minimal probative value of admitting the substance of complaints against the former employee, the trial court's limiting instruction was ineffective in ameliorating the prejudicial effect of the evidence; and the trial court's error in admitting character evidence was prejudicial and prevented the former employee from having a fair trial.

Judge Grimes dissented concluding that any error in the admission of the employee complaints was not prejudicial and the trial court correctly found "there was substantial, credible evidence on both of the critical points: the harassment was not severe or pervasive, and there was no adverse employment action."

Hodges v. Cedars-Sinai Medical Center (2023) 91 Cal.App.5th 894 (April 28, 2023)

Deanna Hodges began working for Cedars-Sinai Medical Center ("Cedars") in 2000 as an administrator. Throughout her employment, she had no patient care responsibilities. In 2017, she was diagnosed with stage III colorectal cancer. She stopped working for a year and a half to undergo treatment, which included chemotherapy. In 2017, Cedars announced a new policy

requiring all employees, regardless of their role, to be vaccinated by the beginning of flu season. This was the latest expansion to Cedars' longstanding efforts to limit employee transmission of flu, which had become more urgent following multiple patient deaths relating to flu. As required by law, Cedars' policy made exemptions for "valid medical or religious" reasons. If an exemption was granted, the unvaccinated employee would be required to mask in all patient care areas. If an exemption was not granted, the employee would be subject to termination. Cedars established an exemption evaluation process through which a panel would grant an exemption only for a "recognized medical contraindication."

Hodges did not want to get the flu vaccine, despite not having any contraindications to the flu vaccine. Hodges and her doctor stated in the exemption form that Hodges has a "history of multiple allergies post-treatment for colorectal cancer with chemoradiation. Extreme unwell state results from injections and immunizations. No direct patient contact." She was informed that her form was illegible and that she would be suspended and terminated if she did not agree to get the flu vaccine. Hodges attempted to convince a variety of personnel that her exemption request was valid and should be granted. The exemption evaluation request panel denied her exemption request. Hodges' doctor then attempted to persuade her to receive the vaccine. Hodges refused and Cedars terminated her effective November 9, 2017.

Hodges filed a lawsuit against Cedars alleging: 1) disability discrimination; 2) failure to engage in the interactive process; 3) failure to accommodate a disability; 4) retaliation; 5) failure to take reasonable steps to prevent discrimination, harassment, and retaliation; and 6) wrongful termination. Cedars successfully moved for summary judgment and Hodges appealed to the court of appeal.

After a thorough review of the evidence, including depositions, declarations, and exhibits, the court of appeal decided that Hodges did not have a medically valid contraindication that constituted a disability. Even if she did, the court of appeal stated, Cedars terminated Hodges for a legitimate nondiscriminatory reason – noncompliance with a bona fide employer policy aimed at protecting and saving lives. The court of appeal also ruled in favor of Cedars on the

reasonable accommodation cause of action. It concluded Hodges was not disabled, and she was not entitled to an exemption from the flu vaccination mandate. The court of appeal affirmed the trial court's decision.

O'Brien v. The Regents of the Univ of Cal. (2023) 92 Cal.App.5th 1099 (June 29, 2023)

A University of California (UC) Berkeley faculty member, O'Brien, filed a petition for writ of mandate directing the Regents of the University of California to set aside disciplinary findings and sanctions imposed based on sustained allegations of sexual harassment by O'Brien of a graduate student during a 2012 conference. O'Brien contended that 1) the University waited too long to file a disciplinary complaint against him, 2) he did not violate a policy prohibiting mistreatment of a colleague, 3) disciplinary proceedings were unfair, and 4) the sanction imposed on him was excessive. The trial court denied the petition. O'Brien appealed.

Importantly, the court of appeal found that the disciplinary decision was timely and did not violate the UC's rule establishing a three-year time limitation for filing disciplinary charges. It clarified that the time limitation triggered by when the "Chancellor knew or should have known of an alleged violation," is distinct from the inquiry notice generally applicable to civil litigants, because it must be read in the context of the Faculty Code of Conduct. Thus, notice is triggered when a violation of the Faculty Code of Conduct is reported to certain individuals, whose knowledge is then imputed to the Chancellor. Knowledge of the violation of the Faculty Code of Conduct could not be imputed to the Chancellor until the target of the sexual harassment came forward with a complaint. The UC initiated a disciplinary proceeding within three (3) years of receiving the complainant's report of sexual harassment.

Additionally, the court found that a graduate student is a "colleague" of a UC faculty member, such as to trigger applicable policies in the Faculty Code of Conduct. In doing so, the court rejected the notion that a colleague only includes individuals of the same rank.

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Hittle v. City of Stockton (2023) 76 F.4th 877 (August 4, 2023)

Plaintiff Ronald Hittle, former fire chief, filed a lawsuit in district court alleging his termination violated FEHA. He alleged he was wrongfully terminated based upon his religion, and specifically for attending a religious event. The district court granted the City of Stockton's summary judgment motion. Plaintiff appealed.

The court of appeal explained that on summary judgment, direct evidence of discrimination is that which, "if believed, proves the fact of [discriminatory animus] without inference or presumption." Therefore, derogatory comments made by a decisionmaker are "direct evidence of ... discriminatory animus," and "can create an inference of discriminatory motive." Here, the Plaintiff provided examples of the decisionmaker's reference to him as being part of a "Christian coalition," and a "church clique." The court of appeal found that these comments did not constitute discriminatory animus, as these terms originated with other employees who expressed dissatisfaction with the Plaintiff, and the decisionmaker simply repeated them. The court of appeal further reasoned that the fact that the termination notice referenced the Plaintiff's attendance at a religious event does not constitute animus because the basis for discipline was that the Plaintiff attended such event on paid time, with no evidence of benefit to the City. The court distinguished caselaw stating that "a single discriminatory comment is sufficient to preclude summary judgment for the employer," by explaining that this case did not involve "clearly sexist, racist, or similarly discriminatory statements or actions by the employer." For these reasons, the court of appeal upheld the granting of summary judgment in the City's favor.

Martin v. Board of Trustees of the Cal. State University (2023) 97 Cal.App.5th 149 (November 14, 2023)

Plaintiff, Jorge Martin, a former department director of the California State University, Northridge (CSU), alleged that CSU created a hostile work environment and subjected Plaintiff to harassment on the basis of his race, sex and gender. The court of appeal found the trial court correctly granted summary judgment on Plaintiff's discrimination claims as CSU submitted

unrebutted evidence that it terminated the Plaintiff's employment for legitimate, nondiscriminatory reasons. For instance, Plaintiff attempted to use statistical evidence showing that more men than women employees were terminated when allegations were sustained against them. In response, the court of appeal explained that use of statistics to prove discriminatory intent in disparate treatment cases must be more exacting, and that "statistics must demonstrate significant disparity and must eliminate nondiscriminatory reasons for the apparent disparity." For these reasons and others, the court of appeal found that Plaintiff did not prove that there was a triable issue of fact, and summary judgment was properly granted.

Muldrow v. City of St. Louis, Missouri (2024) 601 U.S. ____ (April 17, 2024)

Plaintiff brought a Title VII of the Civil Rights Act of 1964 ("Title VII," 42 U.S.C. § 2000e et seq.) suit to challenge a transfer on the basis that such employment action was discriminatory based on her gender. The trial court dismissed the claims, and the court of appeal affirmed, holding that the employment decisions she alleged did not constitute "adverse employment action," and thus, did not establish a prima facie case of gender discrimination under Title VII, nor were they "materially significant disadvantage[s]." On appeal before the United States Supreme Court, in a unanimous decision, the Court found that an employee challenging a job transfer under Title VII need only show some employment disadvantage resulting from the transfer but need not show a "significant'' disadvantage. In issuing its ruling, the Court resolved a circuit split regarding the threshold for harm necessary to maintain a Title VII claim related to a job transfer.

California has recognized that transfers can be adverse, so this decision again brings Title VII jurisprudence more in line with what has already been the law under FEHA.

Raines v. U.S. Healthworks Medical Group (2023) 15 Cal.5th 268 (August 21, 2023)

Plaintiffs were applicants who were offered jobs contingent on passing a preemployment medical screening. They brought a putative class action in superior court against a medical testing organization and employers for violation of FEHA and other state law claims. The

defendants were business entities that provide preemployment medical screenings that were alleged to have included impermissible and invasive questions. The defendants removed the case to district court and moved to dismiss the complaint. The district court granted the motion to dismiss. Applicants appealed.

At issue in this case was whether FEHA, which defines "employer" to include "any person acting as an agent of an employer," permits a business entity acting as an agent of an employer, rather than an employer itself, to be held directly liable for employment discrimination.

The court of appeal reviewed the precedent *Reno v. Baird* (1988) 18 Cal.4th 640, wherein the California Supreme Court held that individual employees who are not themselves employers could not be sued under FEHA for alleged discriminatory acts. The court of appeal also reviewed the precedent *Jones v. Lodge at Torrey Pines* (2008) 42 Cal.4th 1158, wherein the California Supreme Court found that supervisory employees could not be liable under the FEHA for retaliatory acts. However, the court of appeal distinguished this case because business-entity agents are more likely to have comparable bargaining power to the employer. For this reason and others, the court of appeal concluded that FEHA permits business entities acting as agents of an employer to be directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances where the entity carries out FEHA-related activities on behalf of the employer.

Wage and Hour

Krug v. Board of Trustees of California State University (2023) 94 Cal.App.5th 1158, review granted December 13, 2023

In March 2020, in response to the shelter-in-place orders caused by the COVID-19 pandemic, California State University (CSU) ordered its faculty to teach remotely. The plaintiff Patrick Krug, a CSU professor, tried to retrieve his CSU-provided computer and printer to bring home, but he was denied access to his CSU office. As a result, the professor replaced these items and asked the CSU for reimbursement. However, CSU refused to reimburse him.

The professor sued CSU claiming he and other similarly situated faculty members were entitled to reimbursement under California Labor Code section 2802 for home-office expenses which were reasonable and necessary to perform remote work duties. Labor Code section 2802, subdivision (a) states that "an employer shall indemnify [an] employee for all necessary expenditures…incurred…in direct consequence of the discharge of his or her duties."

The trial court ruled against the professor on the basis that a governmental agency is generally exempt from Labor Code statutes that do not expressly apply to public employers. The professor appealed.

The court of appeal affirmed the trial court judgment. In finding that CSU was excluded from Labor Code section 2802, the court of appeal applied the three-part test for determining whether the sovereign powers cannot overcome a generally applicable Labor Code provision: First, does the statute contain "express words" referring to governmental agencies? Second, if not, does the statute contain any "positive indicia" of a legislative intent to exempt the agency from the statute? Third, if no such indicia appear, does applying the statute infringe upon sovereign governmental powers?

First, the court found Labor Code section 2802 contained no express words referring to governmental agencies. Second, the court similarly found there was no "positive indicia" to exempt CSU from the statute's reach. Third, the court analyzed whether applying the statute to CSU would result in an infringement of sovereign governmental powers. The court determined CSU was a state agency that did have sovereign powers – namely, to produce public higher education. The court found that the Education Code gave CSU trustees broad authority to proscribe the policies and procedures for acquiring supplies and equipment, including setting the rules regarding equipment allowances. As a result, the court found that applying section 2802 to CSU in this case could infringe on CSU's sovereign governmental powers. Specifically, the court determined that if section 2802 were applied to CSU, it would limit the discretion vested in CSU to establish employee expenditure reimbursement policies. In addition, the court found that if CSU were ever held liable under Labor Code section 2802, it would potentially result in CSU

having to divert funds from their limited education budget, to paying legal judgments and attorneys' fees to outside parties. According to the court, this would be an interference with the CSU's ability to exercise its sovereign power to provide public education.

The court held that under the facts of this case, section 2802 did not apply to CSU. The court made it clear a case-by-case inquiry must be conducted. It wrote: "We do not hold that section 2802 never applies to public employers, only that it does not apply in this case because the Legislature vested CSU with sovereign authority with which section 2802 would interfere." The court of appeal dismissed the plaintiff's Private Attorney General Act ("PAGA") claim because he did not prove Labor Code section 2802 applied to him.

The California Supreme Court granted review of the case; however it ordered briefing deferred pending decision in *Stone v. Alameda Health System*, Case No. S279137, which presents the following issues: (1) Are all public entities exempt from the obligations in the Labor Code regarding meal and rest breaks, overtime, and payroll records, or only those public entities that satisfy the "hallmarks of sovereignty" standard adopted by the court of appeal in this case? (2) Does the exemption from the prompt payment statutes in Labor Code section 220, subdivision (b), for "employees directly employed by any county, incorporated city, or town or other municipal corporation" include all public entities that exercise governmental functions? (3) Do the civil penalties available under the Private Attorneys General Act of 2004, codified at Labor Code section 2698 et seq., apply to public entities?

Public Pensions

Alameda Health System v. Alameda County Employees' Retirement Association (2024) 100 Cal.App.5th 1159 (March 27, 2024)

The Alameda Health System (AHS) became a participating employer with the Alameda County Employees' Retirement Association (ACERA) in 1998 when it separated from the County of Alameda. In 2017, AHS claimed ACERA's funding methodology resulted in ACERA overcharging AHS from 2002 going forward. AHS and two employees filed a petition for writ of mandate in superior court. In the lawsuit, AHS pursued its request that ACERA's actuary

conduct a comprehensive study of what AHS's contributions might have been under a different methodology. AHS also pursued its request that the ACERA board change ACERA's actuarial funding methodology. AHS claimed this change would result in retroactive and prospective adjustments totaling $100 million fewer contributions by AHS. Under AHS's formulation, AHS would be charged less and ACERA's other participating employers would be charged more.

The trial court found ACERA established the "percentage of payroll" method ACERA's actuary uses to calculate employer contribution rates is actuarially sound, prudent and a longstanding funding methodology of ACERA. The trial court also held ACERA proved the methodology is consistent with the methodology used by other public pension plans in California and nationally. Further, the trial court found ACERA demonstrated that when considering AHS's requests it complied with their fiduciary duties of care and loyalty to the overall best interest of all members. The trial court ruled ACERA established it acted within their legal discretion in declining AHS's requests for a further actuarial study and change in methodology. AHS and the two employees appealed. The court of appeal affirmed the trial court's ruling.

Ventura County Employees' Retirement Association v. Criminal Justice Attorneys Association of Ventura County, et al. (2024) 98 Cal.App.5th 1119, review granted April 17, 2024

In July 2020, in the decision *Alameda County Deputy Sheriff's Association, et al. v. Alameda County Employees' Retirement Association, et al. ("Alameda")*, the California Supreme Court upheld the constitutionality of the provisions of the California Public Employees' Pension and Reform Act ("PEPRA") of 2013 that amended the County Employees' Retirement Law ("CERL") of 1937. Following the *Alameda* ruling, many county retirement systems implemented the California Supreme Court's directives by passing resolutions redefining "compensation earnable" (i.e., what income of employees who are deemed "legacy" or "classic" employees is pensionable).

Ventura County is the first published California court of appeal decision applying the California Supreme Court's guidance in *Alameda* regarding PEPRA's restrictions on "compensation earnable." In October 2020, the Ventura County Employees' Retirement

Association ("VCERA") adopted a resolution excluding compensation for accrued but unused hours of annual leave exceeding employees' calendar year allowance ("leave cashouts") for purposes of calculating their retirement benefits. The resolution was based on VCERA's interpretation of a provision in PEPRA that defines "compensation earnable" as including "payments that do not exceed what is earned and payable in each 12-month period during the final average salary period regardless of when reported or paid." Employee organizations objected to the VCERA resolution because the focus on "calendar year" was incongruent with employees' ability to designate either a 12- or 36-month (based on the applicable pension tier the employee) final average compensation period that straddled multiple years.

VCERA filed a declaratory relief action against employee associations asserting it had legal authority to exclude from "compensation earnable" accrued but unused hours of annual leave exceeding employees' *calendar year* allowance. A retiree (former county counsel of Ventura County) filed a cross complaint for declaratory relief and the county filed a complaint in intervention. The court of appeal ruled in favor of VCERA, finding that the retirement board was obligated to exclude compensation for unused leave exceeding the employee's calendar year allowances. The court of appeal nonetheless recognized the impact its ruling has on retirees.

The California Supreme Court granted review of the following issue: For purposes of calculating retirement benefits for members of County Employees Retirement Law of 1937 (Government Code section 31450 et seq.) retirement systems, does Government Code section 31461, subdivision (b)(2) exclude payments for accrued, but unused hours of annual leave that would exceed the maximum amount of leave that was earnable and payable in a calendar year?

Estrada v. CalPERS (2023) 95 Cal.App.5th 870 (September 21, 2023)

The plaintiff, Elaine Estrada, worked as an accountant and payroll administrator for the City of La Habra Heights ("City") from November 2005 to August 2012. She was eligible for retirement benefits as a member of the California Public Employees' Retirement System ("CalPERS"). Estrada was criminally charged with misappropriation of public funds

embezzlement by a public officer. The criminal complaint alleged Estrada, who was responsible for the payroll and timekeeping of all the city's employees, removed payroll deductions. As a result, she allegedly did not pay the required employee share for dependents covered on her health care plan between April 2007 and July 2009. The City discovered this during a 2012 audit.

The plaintiff pled no contest to a felony arising out of the performance of her official duties, specifically unauthorized computer access under section 502 of the Penal Code. The terms of her plea agreement later reduced the conviction to a misdemeanor then dismissed it.

CalPERS notified the plaintiff that she was no longer eligible to return to CalPERS-covered employment or to accrue further CalPERS benefits and that a part of her accrued benefits was subject to forfeiture under Government Code section 7522.72 (PEPRA) due to her felony conviction.

The plaintiff filed a petition for writ of mandate seeking to set aside CalPERS' decision. The trial court denied her petition. She appealed. The court of appeal ruled retirement benefits are subject to forfeiture upon a no-contest plea to a felony relating to a job or arising out of the performance of official duties even if the conviction is later reduced to a misdemeanor and dismissed. That result is consistent with the language and purpose of section 7522.72 of California's Government Code, which provided that, if a public employee was convicted of a felony for conduct arising out of, or in the performance of their official duties, the employee would forfeit certain accrued retirement benefits. These benefits would remain forfeited despite a reduction in the sentence or an expungement of the conviction.

McCormick v. CalPERS (2023) 90 Cal.App.5th 996 (April 3, 2023)

Plaintiff Cari McCormick worked as an appraiser for Lake County in a courthouse. She developed medical symptoms that were seemingly caused by her office environment. After her employer ("County") denied her request for reasonable accommodation to work in a different location, and her protected leave was exhausted, the County terminated her.

She applied for disability retirement. CalPERS denied her disability retirement application. She appealed the denial, and her appeal was heard by an administrative law judge ("ALJ"). The Board of Administration of CalPERS adopted the ALJ's decision and denied her application on the basis that her condition did not prevent her from performing her job duties at a theoretical different location.

McCormick filed a petition for a writ of administrative mandate. The trial court denied it. On appeal, McCormick claimed that the trial court's decision must be reversed because it applied the wrong legal standard. The court of appeal agreed. It held that employees are eligible for CalPERS disability retirement under Government Code section 21156 when, due to a disability, they can no longer perform their usual duties at the only location where their employer will allow them to work, even if they might be able to perform those duties at a theoretical different location. The court of appeal clarified an employee does not need to request reasonable accommodation to become eligible for disability retirement.

In a later published decision, the court of appeal held McCormick's lawsuit conferred a significant benefit on the public, and thus, she was entitled to an award of attorneys' fees under the private attorney general doctrine (California Code of Civil Procedure section 1021.5.) The court of appeal remanded the matter back to the trial court to determine the amount of the attorneys' fees award.

Anti-SLAPP Motions

Miszkewycz v. County of Placer (2024) 99 Cal. App. 5th (January 25, 2024)

In 2006, Jennifer Miszkewycz (Plaintiff) was hired by Placer County (County) as a deputy district attorney. In the ensuing twelve years, Plaintiff was promoted from classified service positions and in 2018 was elevated to the unclassified service position of assistant district attorney. In March 2020, after the district attorney retired midterm, Plaintiff became the acting district attorney. A month later, a new district attorney was appointed, and Plaintiff returned to the position of assistant district attorney. In July 2020, Plaintiff was demoted to the classified

service position of senior deputy district attorney, resulting in a reduction in compensation of more than forty-thousand dollars per year.

Plaintiff filed a lawsuit in superior court for whistleblower retaliation. The complaint alleged that the demotion and hostile work environment were a result of cooperation with the California Attorney General's office in its investigation of purported wrongdoing within the County District Attorney's office. In response, the County filed a special motion to strike under the anti-SLAPP statute, asserting that Plaintiff's claim arose from protected activity stating that the decision to demote "was connected to an official proceeding because a section of the County Code authorized her demotion." The trial court denied the motion, finding that the County failed to comply with California Rules of Court 3.1322(a), which provides that a motion to strike "must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense." Additionally, the trial court concluded that the County's demotion of Plaintiff was not protected activity under Code Civil Procedure section 425.16 because it was not an official proceeding under subdivision (e)(2). The County appealed.

The court of appeal affirmed the trial court's denial of the County's motion to strike, but also concluded that the trial court erred in finding that the County was required to comply with Rule 3.1322(a). Applying 3.1322 and focusing narrowly on the quoted language could allow "artful" motion practice to target allegations of protected conduct that simply provide context to the plaintiff's claim for relief, which would undermine the statute's purpose in leaving such allegations unaltered. As to the issue of protected activity as it pertains to Rule 425.16, the court ruled that the County did not meet its burden of demonstrating that Plaintiff's claims for relief arose from the County's protected activity. The County's arguments amounted to a misreading of California Supreme Court decisions addressing when official actions can be considered SLAPP-shielded speech, rather than litigable decisions. The court ruled that Plaintiff was not suing over statements made by County officials, but rather over the County's adverse employment actions.

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Collective Bargaining Statutes: Court Decisions

Visalia Unified School District v. Public Employment Relations Board (2024) 98 Cal.App.5th 844, review denied on April 24, 2024

California School Employees Association ("CSEA") filed an unfair practice charge with the Public Employment Relations Board (PERB) against Visalia Unified School District ("District") alleging the District violated the Educational Employment Relations Act ("EERA") by terminating an employee ("officer") – a secretary and local union chapter president – in retaliation for engaging in protected union activity.

PERB concluded that: (1) the employee's status as a union officer is activity protected by the EERA; (2) the District retaliated against the officer for her union activity; and (3) the District failed to prove it would have terminated her notwithstanding an antiunion motive. The District filed a writ of extraordinary mandamus.

The court of appeal held, in a published decision, that the Board correctly interpreted the law, properly found an inference that the District retaliated against the employee for her union activity, but erred in holding that the District failed to prove its affirmative defense it would have terminated the employee for poor performance notwithstanding any protected activity. The court of appeal set aside the PERB decision and directed the Board to modify the decision consistent with its opinion and dismiss the complaint issued against the District.

The court of appeal relied on the test in *Palo Verde Unified School District* which provides that establishing retaliation under the EERA requires either direct proof or evidence "that: (1) the employee exercised rights guaranteed by [the] EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took action against or adverse to the interest of the employee; and (4) the employer acted because of the employee's exercise of the guaranteed rights." (*Palo Verde Unified School Dist.* (2013) PERB Decision No. 2337-E, p. 10.)

The court of appeal determined that the officer exercised protected rights by virtue of being a union officer, and the District did not dispute knowledge and adverse action. Thus, the

issue turned to the District's intent for terminating the officer, which the District argued was based on her errors in recording student attendance.

The court of appeal reiterated PERB precedent for analyzing an employer's intent, where the Board "considers all relevant facts and circumstances," and has "identified the following factors as being the most common means of establishing a discriminatory motive, intent, or purpose: (1) timing of the employer's adverse action in relation to the employee's protected conduct; (2) disparate treatment; (3) departure from established procedures or standards; (4) an inadequate investigation; (5) a punishment that is disproportionate based on the relevant circumstances; (6) failure to offer a contemporaneous justification, or offering exaggerated, questionable, inconsistent, contradictory, vague, or ambiguous reasons; (7) employer animosity toward union activists; and (8) any other facts that might demonstrate the employer's unlawful motive." (*City & County of San Francisco* (2020) PERB Decision No. 2712-M, p. 21.)

On review, the court of appeal explained that it does not "reweigh the evidence. If there is a plausible basis for the Board's factual decisions, we are not concerned that contrary findings may seem to us equally reasonable, or even more so." (*California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 1087.)

The court of appeal accepted the Board's conclusion that the District inferentially terminated the officer in retaliation for protected activity, explaining that the Board's conclusion is reasonable due to the timing between the officer's critical comments at the District's school board meeting and her subsequent placement on leave, the District's exaggerated and noncontemporary justifications, the District's inadequate investigation, and the District's union animosity. However, the court of appeal found that the disparate treatment and disproportionate factors do not withstand scrutiny and are not supported by substantial evidence.

Regarding disparate treatment, the court of appeal found that the Board erred in eschewing the requirement that "[a]bsent evidence a similarly situated employee committed similar errors, the disparate treatment finding cannot stand." (citing *Sacramento City Unified*

School District (2010) PERB Dec. No. 2129-E, p. 10; *Gupta v. Trustees of Cal. State Univ.* (2019) 40 Cal.App.5th 510, 519-520.)

The Board found disparate treatment based on three points, the District: (1) had not terminated any other employee for unintentionally misreporting attendance; (2) had never performed an audit looking at every data entry to determine whether an attendance clerk had made incorrect entries; and (3) policy anticipated a certain amount of human error, particularly requiring teachers to only have an 85 percent (85%) accuracy rate with their files. The court of appeal found that none of these points were supported by substantial evidence because: (1) there is no evidence any employee, other than the officer, ever misreported attendance, and for the same reason, the District had no occasion to conduct a full-scale audit prior to her errors; and (2) the Board's logic ignores the fact that the District's policies were designed to catch all errors before the officer would formally record attendance and the policy did not intend human error to persist.

Regarding disproportionate punishment, the court of appeal found that the Board: (1) improperly discounted all prior discipline that was imposed in her previous position, explaining "[t]here is no sound reason an employer cannot consider past conduct in fashioning appropriate discipline"; (2) failed to account for the gravity of errors at issue in the case; (3) failed to persuasively explain why, after numerous issues spanning several years, the District needed to continue to apply discipline short of termination, explaining "[w]ere PERB and CSEA correct, employees could commit the same mistake ad infinitum without repercussion"; and (4) erred in finding that the District improperly cited, as justification, evidence that it was not permitted to based on the parties' previous settlement agreement, explaining "[t]o the extent the prior settlement constituted evidence, it waws properly admitted by the Education Code hearing officer and subsequently admitted before the Board."

Regarding the District's affirmative defense, the court of appeal explained that the affirmative defense must be established by a preponderance of the evidence, and that on review, "the reviewing court does not ask 'whether substantial evidence supports the judgment,'" but

rather "where the issue on [review] turns on a failure of proof …, the question for [the] reviewing court becomes whether the evidence compels a [contrary] finding … as a matter of law." (citing *Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 965-966; *Phipps v. Copeland Corporation LLC* (2021) 64 Cal.App.5th 319, 333.)

The Court of Appeal concluded that the Board "cannot override a finding [by the District that] sufficient cause for discipline existed." It reasoned that under Education Code section 45113(b) – which provides that "… the governing board's determination of the sufficiency of the cause for disciplinary action shall be conclusive" – once a school board determines it has cause to take disciplinary action against a permanent employee, PERB has no ability to override that determination for being retaliatory.

The court of appeal found that the officer's "errors struck directly at the school's most basic essential infrastructure," that the "errors in this case, corrected or otherwise, were egregious, numerous, and occurred over several years," "[t]here was no reason to believe the errors would subside," and that "the reprimand letters, substandard performance reviews, and errors underlying [the officer's] termination all point to her failure to grasp and perform duties correctly, inattention to detail, not following direction, causing disruption and generating additional work, not understanding the impact her errors wrought, and not achieving [the District's] expected performance."

In so finding, the court of appeal explained that there is a need for a sensible latitude for managerial decision-making and what constitutes satisfactory performance is a question ordinarily vested in the employer's sole discretion.

CSEA petitioned for review as a Real Party in Interest, and the California Supreme Court has yet to decide whether it will grant review.

<u>*Palomar Health v. National Nurses United* (2023) 97 Cal.App.5th 1189 (December 18, 2023)</u> – see below

Kern County Hospital Authority v. Public Employment Relations Board (2024) 100 Cal.App.5th 860 (February 26, 2024) – see below

Workers' Compensation

Velasquez v. Workers' Compensation Appeals Board (2023) 97 Cal.App.5th 844 (December 5, 2023)

The claimant Jose Velasquez (Velasquez) was a convicted felon that entered the Salvation Army's residential adult rehabilitation center for substance abuse treatment as a condition of his probation, relating to a criminal conviction in the County of Santa Barbara ("County"). Velasquez was injured while moving furniture at the Salvation Army's warehouse and sought workers' compensation for his injuries. He claimed he was an employee of the Salvation Army and the County. Both the Salvation Army and the County denied his claim for benefits. The workers' compensation judge identified the issue as: "Employment and whether the applicant was an employee of Defendant the Salvation Army when he was the beneficiary of a court-mandated drug diversion program per Labor Code Section 3352. The parties further raise the applicability of Labor Code Section[s] 3351 and 3301." The workers' compensation judge (WCJ) concluded Velasquez was not an employee of either the Salvation Army or the County. Velasquez petitioned the Workers' Compensation Appeals Board (Board) for reconsideration and the Board granted the petition but deferred ruling on the merits pending "further study." The Board issued its opinion and decision after reconsideration, affirming the WCJ's order. Velasquez filed a petition for a writ of review in the court of appeal.

In briefing filed with the court, the Board requested that the decision be annulled and the matter remanded to the Board for further consideration of whether Velasquez was an employee of the County, and whether the Salvation Army was his employer. The court of appeal declined the Board's request as to the Salvation Army and concluded that remand was indeed necessary as to the County.

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Cal. Dept. Corrections & Rehabilitation v. Workers' Comp. App. Bd. (2023) 94 Cal.App.5th 464, review granted on December 13, 2023

While at his job as a corrections officer at the Lancaster State Prison in August 2002, Michael Ayala (Ayala) was severely injured in a pre-planned attack by inmates. He filed a workers' compensation claim and alleged that the injury was caused by the serious and willful misconduct of his employer, the California Department of Corrections and Rehabilitation (CDCR). Such an allegation is significant because California Labor Code section 4553 provides that "[t]he amount of compensation otherwise recoverable shall be increased one-half ... where the employee is injured by reason of serious and willful misconduct" by the employer. Ayala and CDCR agreed that the injury caused him 85 percent (85%) permanent disability, but they could not agree whether CDCR engaged in serious and willful misconduct.

A workers' compensation ALJ found that CDCR did not engage in serious and willful misconduct. However, on reconsideration, respondent Workers' Compensation Appeals Board (Board) rescinded the workers' compensation judge's decision and reversed, finding that CDCR had engaged in serious and willful misconduct.

Ayala contended that, for the period before his permanent disability, his base compensation was his full salary. He was paid his full salary because he was on industrial disability leave and enhanced industrial disability leave, which are alternatives to temporary disability. CDCR, on the other hand, contended that industrial disability leave benefits, enhanced or not, are not "compensation" as the term is statutorily defined. In CDCR's view, the base compensation was only what Ayala would have been entitled to on temporary disability. Assuming that Ayala would have been entitled to temporary total disability, the base compensation would have been two-thirds of his salary, subject to statutory limits.

The workers' compensation judge agreed with CDCR and found that the base compensation was what Ayala would have been paid in temporary disability. However, upon reconsideration, the Board again rescinded and reversed the workers' compensation judge's

decision, this time finding that the base compensation was what Ayala was paid on industrial disability leave and enhanced industrial disability leave. CDCR petitioned for a writ of review.

The court of appeal held that Ayala was entitled to enhanced benefits as calculated from his temporary disability payments. The court of appeal annulled the decision and remanded to the Board.

The California Supreme Court granted review of the case on the following issue: Should the calculation of enhanced workers' compensation benefits for an employer's serious and willful misconduct under Labor Code section 4553 be based on temporary disability payments available under the Labor Code? The California Supreme Court case is fully briefed.

Whistleblower Protection

City of Whittier v. Everest Nat'l Ins. Co. (2023) 97 Cal. App. 5th 895 (December 6, 2023), partially published

Six police officers in the Whittier Police Department filed suit against the City of Whittier ("City") alleging that the department subjected them to retaliatory discipline in violation of Labor Code Section 1102.5 upon refusing to comply with an illegal citation and arrest quota system used to evaluate their performance. The City's insurers settled the lawsuit and submitted the settlement for coverage under its Employment Practice Liability policies. The policies provided coverage "for loss arising out of [the insured's] employment practice liability wrongful act," which included "retaliation." The insurers denied the City's request for indemnity on the grounds that retaliation claims under section 1102.5 could only be established through proof of an employer's willful act and that Insurance Code Section 533 barred coverage for such acts. The City brought a declaratory judgment action against the insurer for breach of contract.

The trial court granted summary judgment for the insurers. The court reasoned that Section 533 prohibited coverage for loss caused by an insured's willful act and that claims for whistleblower retaliation under section 1102.5 could "only be established by the evidence of an employer's motive and intent to violate or frustrate" the state's whistleblower laws. The City appealed.

The court of appeal disagreed. The court of appeal analyzed various cases applying Section 533 to bar coverage for retaliation or wrongful termination claims but concluded that those cases should not be read broadly to assert that any alleged retaliation is deliberate under Section 533. Additionally, the court stated that Section 1102.5 was not limited to obvious intentional misconduct, and that an employer could violate the law by negligently attempting to prevent business harm from a recalcitrant employee. Further, the court found that the police officers in the underlying lawsuit could succeed on their claims without proving that the insured knew that its policy was illegal or that the insured acted "maliciously, punitively, or in bad faith." The court determined that the police officers could prevail without proof of willful conduct and held that Section 533 did not preclude coverage for the underlying lawsuit in the absence of any further finding that the insured's conduct was in fact willful or that some or all of the settlement was in fact allocable to willful conduct.

Brown v. City of Inglewood (2023) 92 Cal.App.5th 1256, partially published, review granted on September 27, 2023

The plaintiff, Wanda Brown, was an elected city treasurer. She sued the City of Inglewood (City) and several members of the city council alleging that after she reported concerns about financial improprieties, the City and the city council members defamed and retaliated against her. She brought a lawsuit alleging defamation, violation of Labor Code 1102.5(b) and (c), which prohibit retaliation against an employee based on the employee reporting or refusing to participate in what the employee reasonably believes to be illegal activity by the employer (the section 1102.5 retaliation claim); and (3) intentional infliction of emotional distress (IIED), based both on the alleged retaliation and the alleged defamation. The City and the individual defendants filed a joint special motion to strike the complaint as a strategic lawsuit against public participation, or SLAPP, under the anti-SLAPP statute (Code Civil Procedure section 425.16). The superior court granted the motion in part but denied it as to the section 1102.5 retaliation claim and the retaliation-based IIED claim against all defendants. The defendants appealed.

In an unpublished portion of the opinion, the court of appeal held that the retaliation-based claims against the individual defendants arise from protected activity under the anti-SLAPP statute, and that the court should have stricken the retaliation-based IIED claim based on the second step of the anti-SLAPP analysis. In the published portion of the opinion, the court of appeal concluded the court should have stricken the section 1102.5 retaliation claim as well, because an elected official is not an "employee" for the purposes of that statute.

The California Supreme Court granted review on the following issue only: Are elected officials employees for purposes of whistleblower protection under Labor Code section 1102.5, subdivision (b)? The California Supreme Court case has been fully briefed.

Retaliation/Discipline/Due Process

LaMarr v. Regents of the University of California (2024) __ Cal.Rptr.3d __; 2024 WL 1735773 (April 5, 2024)

June LaMarr (LaMarr) was a medical office services coordinator (MOSC) level V at the University of California Davis Medical Center's cancer center in 2014. LaMarr's supervisor, Walter Knowles (Knowles), suspended her for three (3) days in July 2014 for performance issues. Performance issues persisted after the suspension. Knowles subsequently prepared, but did not issue, a "Letter of Intent to Dismiss" LaMarr in August 2014. Knowles's supervisor, Chris Jackson (Jackson), testified at trial he thought this was an unusually expedited discipline procedure and it concerned him. Therefore, Jackson sought to defuse the situation by transferring LaMarr to another location. He eventually found a MOSC level III position at the MIND Institute (Institute) and LaMarr agreed to transfer there on a temporary basis at her normal level V salary.

In early 2024, Jackson informed LaMarr that her supervisor at the Institute was pleased with LaMarr's performance and was comfortable making the role permanent. However, Jackson informed LaMarr that she would not be able to keep her level V salary but would have to accept a MOSC III position if she wanted to stay at the Institute. In an email, Jackson gave LaMarr two options: 1) remain at the Institute as a MOSC III receiving MOSC III-level pay; or 2) return to

the cancer center as a MOSC V. However, Jackson told LaMarr that if she returned to the cancer center she might be subject to the pending action that was previously put on hold. LaMarr responded that she would like to remain at the cancer center but did not want to return to a hostile environment that could lead to her dismissal; therefore, she would remain at the Institute even though her pay would be reduced.

Subsequently, LaMarr brought an action in superior court for denial of due process under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 195. After a court trial, the trial court issued its judgment, finding against LaMarr. The court framed the controverted issue as: "Whether Ms. LaMarr was deprived of due process on March 10, 2015, when, without offering her a pre-deprivation Skelly hearing, defendant proposed to either transfer her to a non-supervisory position with reduced pay (at the ... Institute or the [c]ancer [c]enter) or return her to her higher paying supervisory position at the [c]ancer [c]enter and face possible termination proceedings." (Fn. omitted.) The court answered this in the negative for two reasons. First, the Regents of the University of California never issued a notice of intent to dismiss. Second, though LaMarr honestly believed she was under duress, "no legal authority supports her position that a subjective feeling of duress triggers due process protections." Thus, LaMarr "failed to prove by a preponderance of the evidence that [the Regents] deprived her of her due process." LaMarr appealed.

The court of appeal affirmed. The court held that, "What *Skelly* requires is unambiguous warning that matters have come to a head, coupled with an explicit notice to the employee that he or she now has the opportunity to engage the issue and present the reasons opposing such a disposition. Moreover, the opportunity to respond must come after the notice of intention to dismiss." Here, the court held that the Regents did not violate LaMarr's due process rights because she was never notified of an intent to terminate and any demotion was voluntary. Although LaMarr's new permanent position at the Institute was a demotion, which is an adverse result, the court held that this transfer occurred without a denial of due process because due process is not required where an employee has voluntarily surrendered the property interest. The court acknowledged that LaMarr

was given a difficult choice; however, the court held that, "a difficult choice is not the same as an involuntary choice." Here LaMarr made her choice with full knowledge of the consequences.

Balakrishnan v. Regents of the University of California (2024) 99 Cal.App.5th 513 (March 1, 2024)

Dr. Gopal Balakrishnan was a tenured professor at the University of California (UC) Santa Cruz. He filed a writ of mandate in superior court after the UC dismissed him and denied him emeritus status based on two proven offenses of sexual assault and harassment.

In 2017, an anonymous letter was posted online that accused him of engaging in a pattern of sexual intimidation, harassment, and assault against young women and gender nonconforming people during his time as a UC professor. The letter contained seven anonymous firsthand accounts of the plaintiff's alleged abuse and called on the UC to act. Over 150 people signed this letter to show their support.

The UC retained an outside investigator to conduct a Title IX investigation. The UC encouraged individuals to share their experiences with the investigator. One incident involved sexual assault of a visiting poet and academic from the East Coast. The investigator found Dr. Balakrishnan engaged in unwelcome physical conduct of a sexual nature, which was squarely within the definition of prohibited conduct under UC's Policy on Sexual Harassment that was in place at the time of the incident. However, the investigator could not substantiate a violation of this policy because it only applied to members of the UC community and the target of his conduct was a visiting poet and academic. A second incident involved attempted rape of a student who had completed her coursework, but before her degree was conferred. The investigator also concluded that it was more likely than not that Dr. Balakrishnan engaged in unwelcome physical conduct of a sexual nature regarding a second individual, falling squarely within the definition of prohibited conduct under the UC policy.

The UC held an administrative hearing and ultimately dismissed Dr. Balakrishnan and denied him emeritus status. The UC argued that Dr. Balakrishnan's conduct towards the visiting poet and academic was subject to discipline because the Faculty Code of Conduct listed the types

of unacceptable behavior, which included conduct against members of the community. "Community," the UC argued, meant the community at-large, rather than the UC community. Dr. Balakrishnan, on the other hand, argued that the Faculty Code only applied to matters "in the scope of their professional roles, not after they have hung up their coat and kicked off their shoes at the end of the day, and certainly not after an after-party for an off-campus poetry summit [unaffiliated] with UCSC." In essence, he argued his conduct occurred off-duty, therefore he could not be disciplined for it. Dr. Balakrishnan next argued the University had no jurisdiction over the second individual's complaint because she was not a student or member of the UC community when he sexually assaulted her.

He filed suit in superior court. The superior court denied his petition and Dr. Balakrishnan appealed.

The court of appeal upheld the UC's decision to dismiss Dr. Balakrishnan. It ruled it was well within the UC's discretion to dismiss the plaintiff and deny him emeritus status on the basis of either or both incidents. The court expressed concern that Dr. Balakrishnan attempted to minimize the significance of his sexual misconduct.

Los Angeles Unified School Dist. v. Office of Admin. Hearings (2023) 9 Cal.App.5th 208 (May 5, 2023)

The Los Angeles Unified School District (LAUSD) served a teacher with a notice of intent to dismiss and notice of suspension without pay. The teacher prevailed on a motion for immediate reversal of suspension (MIRS) before the Office of Administrative Hearings (OAH) and thus received pay during the pendency of the dismissal proceedings. LAUSD prevailed in those OAH proceedings and then sought a writ of administrative mandamus in the superior court seeking to set aside the order granting the MIRS and to recoup the salary payments it had made to the teacher during the pendency of the proceedings.

The trial court: (1) denied the writ, holding that the MIRS order is not reviewable; (2) ruled that LAUSD cannot recover the payments to the teacher under its cause of action for money had and received; and (3) ruled that LAUSD's cause of action for declaratory judgment is

derivative of its other claims. The court of appeal affirmed the trial court's judgment against LAUSD and in favor of the teacher.

The court of appeal held that: (1) the statutory scheme governing dismissal proceedings did not authorize judicial review of the MIRS order after the OAH's final decision dismissing teacher; and (2) the teacher's failure to timely file and serve the MIRS did not deprive OAH of jurisdiction to grant the motion.

At issue before the court of appeal was the meaning of Education Code § 44939(c)(6), which states: "A motion made pursuant to this section shall be the exclusive means of obtaining interlocutory review of suspension pending dismissal. The grant or denial of the motion is not subject to interlocutory judicial review."

The court rejected LAUSD's contention that because the statutory language only expressly prohibits interlocutory review, it therefore permits review after the final decision. In concluding that Section 44939 does not authorize judicial review after a final decision, the court turned to extrinsic aids to interpret the provision, finding that: (1) sections 44945 and 44939 are both part of Article 3, section 44945 shows that the Legislature knew how to provide for court review, and nowhere in Article 3 does it provide for court review of a MIRS order; and (2) the Legislature's failure to expressly provide for judicial review of one aspect of dismissal (MIRS order) in the same manner as it did for judicial review of another aspect of dismissal (final merits decision) suggests the Legislature did not intend to provide for judicial review of the MIRS order.

So too did the court reject LAUSD's contention that declaring judicial review unavailable for a MIRS order would create "an absurd application" of section 44939. LAUSD argued that although the MIRS was granted LAUSD was successful with its cause of dismissal when presenting evidence at the hearing and thus able to prove something that was not sufficiently alleged in its pleading, and without judicial review of the MIRS, the contradictory result remains intact. The Court reasoned, in rejecting this contention, that subsequent proof that the facts are

true does not contradict a finding in the MIRS order that those facts are not sufficient to constitute a basis for immediate suspension.

Furthermore, the Court rejected LAUSD's argument that precluding it from recovering any public funds used to maintain a safe school environment – by virtue of being forced by the MIRS ruling to assign the teacher to her home to avoid risking school safety – would create an absurd application of section 44939. The Court found that LAUSD failed to show that the Legislature, in adding the MIRS procedure, intended school districts to be able to recover payments to subsequently dismissed employees.

While LAUSD claimed that review of the MIRS ruling is available under Code of Civil Procedure section 1094.5, the trial court found it forfeited the claim by not providing any discussion of the section nor any relevant case authority. LAUSD failed to address the court's forfeiture argument before the Court of appeal, and the Court found that it failed to provide any reasoned argument or relevant case law to show how section 1094.5 would apply to a MIRS proceeding.

LAUSD further claimed that the ALJ lacked jurisdiction to hear the MIRS because the teacher did not file and serve it within 30 days of notice as specified by section 44939, and that therefore, the ALJ acted in excess of and without jurisdiction, which permits a court to grant relief even if administrative remedies have not been exhausted.

The court rejected this contention, explaining that: (1) LAUSD failed to provide any legislative history showing the Legislature intended the ALJ to lose jurisdiction of a late-filed MIRS; (2) absent such unknown history, there is no reason to think the Legislature intended that an employee, for whose benefit the MIRS proceeding exists, would completely lose her right to a MIRS hearing if she files and serves the MIRS a few days late, particularly where, as here, the ALJ finds the delay excusable; (3) while the Legislature intended to require speedy dismissal proceedings, a MIRS motion is separate from the dismissal proceedings, and the grant or denial of the MIRS has no effect on the dismissal proceedings.

The court also found that "there is no legal authority supporting the proposition that a party's failure to comply with a mandatory filing and service deadline necessarily deprives a court (or administrative body) of jurisdiction to act on the motion, or creates a bar to relief." While such a deprivation or bar may occur in some circumstances, the court noted, none of those circumstances were relevant to the instant case. The court reasoned that three of the four cases cited by LAUSD had the consequence of the failure to comply with a statutory deadline spelled out in the statute itself. The fourth case, the court explained, is not based on a specific deadline but rather the court in that case found a judgment of dismissal void because due process requires notice to a plaintiff before a dismissal and notice was not properly given – noting that notice to the opposing party is not an issue on the appeal.

Kourounian v. Cal. Dept. of Tax & Fee Administration (2023) 91 Cal.App.5th 1100 (May 24, 2023)

A State employee brought an action against the California Department of Tax and Fee Administration (Department) alleging retaliation in violation of FEHA for filing an internal complaint with the Department's Equal Employment Opportunity Office (EEO). The superior court entered judgment on the jury's verdict of $425,562 for the employee and denied the Department's motion for a new trial.

The Department appealed, contending that four erroneous evidentiary rulings by the trial court deprived it of a fair trial. Specifically, the Department argued that the trial court erred in: (1) admitting evidence of allegedly retaliatory conduct which pre-dated the filing of his internal complaint; (2) admitting into evidence the employee's EEO complaints; (3) permitting the employee to offer testimony that exceeded the scope of rebuttal; and (4) permitting the employee to offer evidence of 10 failed promotional attempts. The Department also contended that the evidence supporting economic damages is speculative.

The court of appeal found that the trial court erred in admitting evidence about activity that occurred before the filing of the employee's EEO complaints, and that admission of the first

EEO complaint and supplement was prejudicial and prevented the Department from receiving a fair trial. The court did not address the Department's other claims of error.

The court reversed and remanded, holding that: (1) information about the employee's investigation into a taxpayer complaint finding that supervisor had engaged in age discrimination was inadmissible; (2) admission of EEO complaints filed by employee was error; (3) the error in admitting second EEO complaint alleging retaliation for filing initial complaint was harmless; and (4) the admission of the initial EEO complaint alleging retaliation based on the employee's investigative finding of supervisor's discrimination against taxpayer was prejudicial error.

A judgment is reversable only when a party demonstrates that prejudicial error occurred and caused appellant "substantial injury" and that a "different result would have been probable" absent the error. (Code Civ. Proc. § 475.) In assessing the prejudicial effect of errors, the court of appeal may find multiple errors cumulatively prejudicial, even if each error would not be prejudicial when viewed individually.

The court made clear that "[a]s a matter of both logic and law, acts of retaliation must occur after the protected activity," "[a]dverse actions taken before a protected activity cannot constitute retaliation under FEHA." Thus, the trial court erred in admitting evidence about activity that occurred before the employee filed his EEO complaints.

Regarding admitting the EEO complaints, the court explained that because they were clearly prepared outside the courtroom, they constitute hearsay statements by the employee if offered for its truth. The fact that the employee who wrote them was available for cross-examination did not transform his statements in the complaint into non-hearsay or provide an exception to the hearsay rule, nor did the fact that the employee is a party make his out-of-court statements admissible. Moreover, the court noted that "by way of analogy, federal caselaw is abundant that EEOC charges are inadmissible hearsay as is the narrative attached to the charge."

The employee contended that he did not offer the complaints for the truth of the matter, but for other legitimate reasons such as notice to appellant, the employee's state of mind and his good faith and reasonable belief that he was being discriminated against. The court found that

given the employee's failure to articulate the purpose for seeking admission of the complaints when he moved to admit them into evidence, as well as the employee remaining silent when the trial court ruled they were not hearsay, the Department had no basis to request a limiting instruction that the statements were not being admitted for their truth and/or under some other exception to the hearsay rule such as state of mind.

In reaching its conclusion, the court noted that it was a 9-3 verdict, "a close case," and found there is a reasonable probability that if the evidence at trial did not reach back into irrelevant time periods, the Department would have received a more favorable verdict. It reasoned that the total number of alleged bad acts by the Department would have been reduced, a conspiracy among those in the chain of command to retaliate against the employee would have appeared less likely, and the acts of those in the chain of command ignoring the employee and having fits of anger and hostility would have seemed less menacing.

Cruz v. City of Merced (2023) 95 Cal.App.5th 453 (August 23, 2023)

Jose Cruz, a former police officer who allegedly conducted an illegal search, submitted a false police report, and committed perjury at a court hearing challenged the City of Merced's (City) decision to uphold his termination and reverse the personnel board's decision recommending demotion. The superior court denied the officer's petition for writ of administrative mandamus and affirmed the City's decision. The officer appealed.

The court of appeal reversed the trial court's order, found that the trial court erred in upholding several of the charges against the officer, upheld several other charges, and remanded for the trial court to determine whether the surviving charges are sufficient to support the consequence of termination.

Specifically, the court of appeal held that: (1) the officer was not barred by the doctrine of collateral estoppel from litigating the legality of a search he conducted or his credibility; (2) any error in the trial court's application of collateral estoppel to find that officer had been untruthful when testifying was harmless; (3) the trial court's erroneous conclusion that collateral

estoppel prevented the officer from relitigating whether his search of a backpack was legal was prejudicial; (4) the officer's initial search of a backpack was legal; (5) there was insufficient evidence to support the City's charge that the officer had violated police department policies by omitting facts regarding the initial search of a backpack in a police report; and (6) sufficient evidence supported the trial court's determination that the officer's testimony in criminal proceeding that the backpack opened inadvertently was untruthful.

Collateral estoppel has five threshold requirements: (1) the issue to be precluded must be identical to that decided in the prior proceeding; (2) the issue must have been actually litigated at that time; (3) the issue must have been necessarily decided; (4) the decision in the prior proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be in privity with the party to the former proceeding. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077.)

The court found that the trial court erred in concluding that collateral estoppel applied, because the officer did not have a community of interest with the district attorney who was prosecuting the criminal defendants, and the officer was not in control of the criminal prosecution. Privity is not solely a matter of California law, the court explained, it "is a federal due process violation to hold that a judgment is binding on a litigant who was not a party or a privy to the prior action."

The court explained that while it upheld some of the charges against the officer, it "cannot affirm the judgment because the possibility remains that the trial court could conclude, in its independent judgment, that the surviving charges are insufficient to support the officer's termination (i.e., that the termination decision was an abuse of discretion)."

Justice Smith filed a dissenting opinion, which Justice Detjen concurred with, disagreeing with the majority's conclusions that the officer prepared a thorough and complete police report, that the searches at issue were constitutional, and with the decision to remand the matter to the trial court for it to review the penalty of termination that was imposed by the City.

Assn. for L.A. Deputy Sheriffs v. County of L.A. (2023) 94 Cal.App.5th 764 (July 27, 2023)

Three former deputies and a labor union petitioned for writ of administrative mandamus, breach of contract and promissory estoppel against the County of Los Angeles (County) seeking enforcement of settlement agreement and a declaration that the refusal to honor the settlement agreement constituted a violation of due process rights of union members. The settlement agreement purported to reinstate the former deputies to employment following their terminations. The County refused to comply with the settlement agreements. The trial court sustained defendants' demurrer and dismissed the action without leave to amend. Plaintiffs appealed.

The court of appeal reviewed the denial of leave to amend for abuse of discretion and concluded that section 21 of the County policies and procedures does not confer upon county counsel the exclusive authority to settle disciplinary appeals before the commission, and that it was possible that appellant could have reasonably remedied this defect if it had been afforded the opportunity to do so. The trial court therefore erred in denying appellants leave to amend because allowing appellants to file an amended pleading would not be an exercise in futility.

The court of appeal reversed the trial court's judgment of dismissal, and remand with instructions to vacate the court's orders sustaining respondents' demurrers without leave to amend and issue a new order.

Exhaustion of Administrative Remedies

Kuigoua v. Dept. of Veteran Affairs (2024) WL 1651349 (April 17, 2024)

The California Department of Veteran Affairs (Department) terminated Arno Kuigoua (Kuigoua), a registered nurse, after determining that he sexually harassed women and delivered substandard care that injured patients. Kuigoua appealed his termination to the State Personnel Board, which rejected his appeal after a six-day hearing. Before his hearing, Kuigoua filed an administrative charge of employment discrimination concurrently with the Department of Fair Employment and Housing (DFEH) and the Equal Employment Opportunity Commission (EEOC). The DFEH provided appellant with a right-to-sue notice and Kuigoua then sued the Department in state court on state statutory claims.

The trial court granted summary judgment against Kuigoua for failing to exhaust his administrative remedies, finding a disparity between his administrative and judicial complaints and concluding that the two accounts were unrelated, and an investigation of the former claims would not have uncovered the situation appellant alleged in his judicial complaint. Kuigoua appealed and the court of appeal upheld the lower court's ruling.

As summarized by the court of appeal, appellant "loses this appeal because he changed horses in the middle of the stream. His agency complaint was one animal. On the far bank, however, his lawsuit emerged from the stream a different creature. Changing the facts denied the agency the opportunity to investigate the supposed wrongs [appellant] made the focus of his judicial suit."

It is a mandatory prerequisite to suing in court under the FEHA that the plaintiff must first exhaust the administrative remedy that statute provides by filing an administrative complaint with the DFEH. The DFEH then investigates the alleged unlawful practice and decides whether it can resolve the matter by conference, conciliation, and persuasion. If those measures fail, the DFEH may issue an accusation. If it decides to not issue an accusation, it issues a right-to-sue letter to the aggrieved person.

The court of appeal explained that "employees satisfy the administrative exhaustion requirement if their court claims are like, and reasonably related to, the claims they stated in their administrative filing," and "[i]f an investigation of what was charged in the administrative complaint would *necessarily* uncover other incidents that were not charged, plaintiffs can include the latter incidents in their court action."

Kuigoua's administrative complaint focused on discrimination against men as well as retaliation for his internal complaints. The court of appeal found that "[t]he reasonable interpretation is these internal complaints were about discrimination against men, for Kuigoua identified no other specific basis for a complaint." Kuigoua identified the antagonist as Julian Manalo ("Manalo") and stated that the interval was three and a half months in 2018 and that the scene was the veteran's facility in West Los Angeles.

Kuigoua's operative complaint: (1) did not mention Manalo, but rather two individuals who were not identified in his administrative complaint; (2) did not mention sex discrimination against men, but rather claims of racial and national origin discrimination by one of the newly identified individuals and sexual harassment by the other; (3) changed the time frame from three and one half months in 2018 to three years, reaching back before one of the newly identified individual's retirement; and (4) changed the scene 60 miles north from the veterans facility in West Los Angeles to Lancaster.

Thus, the court of appeal concluded that appellant's judicial claims are not like, and are not reasonably related to, those in his administrative complaint.

The court of appeal further concluded that a DFEH investigation based on appellant's administrative complaint would not have necessarily uncovered the abuses he described in his operative complaint.

The court of appeal reasoned that investigators working off the administrative complaint would have started with appellant's identified antagonist, Manalo, and would not have reasonably discovered his alleged issues with the two individuals who were later identified in his judicial complaint while investigating the facts alleged in the administrative complaint. Also, Manalo was not present at the Lancaster location, which was the only place that the two newly identified individuals worked. Accordingly, the investigation would have begun in West Los Angeles, where Manalo did work, and would have ended there, for nothing in the administrative complaint would have clued in the investigator to the alleged events in Lancaster. This is what occurred, and the investigation never uncovered anything about the two newly identified individuals.

"An investigation that *actually* found no uncharged incidents would not '*necessarily* uncover other incidents that were not charged,'" the court of appeal reasoned. (citing *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1615.)

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Jackson v. Bd. of Civil Service Comrs. of the City of Los Angeles (2024) 99 Cal.App.5th 648 (February 8, 2024)

The City of Los Angeles (City) served Nathan Jackson (Jackson), a detention officer with the City's police department, with a notice of a proposed suspension and imposed the suspension. Following an internal appeals process, the Board of Civil Service Commissioners sustained each count against Jackson and upheld the suspension. Jackson petitioned for a writ of administrative mandate, seeking an order setting aside his suspension and awarding him back pay. The superior court granted the petition in part and set aside the suspension. The officer appealed.

The court of appeal held that the trial court's judgment was not an appealable final judgment and that the court of appeal would not treat the appeal as a petition for writ of mandate.

Code of Civil Procedure section 904.1(a) governs the right to appeal in civil actions and codifies the "one final judgment rule" which provides that "an appeal may be taken only from the final judgment in an entire action." (*Kaiser Foundation Health Plan, Inc. v. Superior Court* (2017) 13 Cal.App.5th 1125, 1138.) The "one final judgment rule" applies equally in administrative mandamus proceedings. (*Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109, 1115.)

The United States Supreme Court in *Dhillon* – where a hospital operator required a doctor to attend an anger-management program, the doctor refused and requested a hearing before the judicial review committee, the hospital operator declined to provide a hearing, and the doctor filed a petition for writ of administrative mandate – explained that two sets of considerations lead it to conclude that the superior court's order partially granting the writ petition was an appealable final judgment. It relied on both considerations in concluding that the judgment was an appealable final judgment.

First, the Supreme Court reasoned in *Dhillon*, the superior court either granted or denied each of the doctor's claims and did not reserve jurisdiction to consider any issues. Second, if the hospital operator could not immediately appeal, the trial court's interpretation of their bylaws

may effectively evade review, as their review board could not overturn the superior court's determination that the doctor was entitled to the hearing in the first place, and therefore, if the hospital operator ultimately prevailed in the administrative proceedings, it would have no basis for seeking review of the decision.

The court of appeal explained that the appealability of a judgment remanding proceedings to an agency that satisfies the first condition (articulated in *Dhillon*) but not the second is a question that the Supreme Court has not addressed.

Here, the trial court did not reserve jurisdiction to consider any other issues after granting, in part, the petition. However, the second consideration in *Dhillon* – that the issues raised on appeal may effectively evade review if there is no right to immediate appeal – did not apply here. The court of appeal reasoned that because the trial court set aside the Board's decision, the Board will reconsider the finding on the first count and the appropriate disciplinary penalty for all counts, as well as whether the City violated Jackson's *Skelly* rights in connection with the second count. If the Board imposes different discipline or declines to award Jackson back pay, the court of appeals explained that he may file a new or supplemental petition for writ of mandate and, if unsatisfied with the outcome, can appeal from the ensuing judgment.

Additionally, in reaching its decision that the trial court's judgment was not an appealable final judgment, the court of appeal reasoned that the policies underlying the one final judgment rule support its conclusion. Specifically, considering in the appeal the issues that Jackson raises, the court of appeal explained, "would invite the type of burdensome, piecemeal disposition of the disciplinary proceeding and raise the possibility of multiple appeals the one final judgment rule is intended to avoid," and "because the trial court set aside the disciplinary penalty and directed the Board to reconsider the appropriate penalty, the circumstances are similar to where 'a trial is bifurcated and first proceeds on the issue of liability,'" and in such cases, "no appeal is allowed until both the liability and damage phases of the trial have been completed." (*Walton v. Magno* (1994) 25 Cal.App.4th 1237, 1240.)

Moreover, the court of appeal reasoned that "the policies underlying the exhaustion of administrative remedies doctrine support treating the judgment as nonfinal," as "the exhaustion doctrine is, in part, 'grounded on policy concerns related to … judicial efficiency.'" (*Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 383.)

Lastly, the court of appeal declined to treat his appeal as a petition for writ of mandate, explaining that it "may review a nonappealable interlocutory order by writ of mandate where 'the issues presented are of great public importance and must be resolved promptly.'" (*Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156, 1166.) The court of appeal disagreed with Jackson that the case presented issues of substantial and continuing public interest, as it found his appeal involved a unique factual scenario and failed to identify any issues of great public importance or explain why the Court must resolve those issues promptly.

Public Employee Investigatory Immunity

Leon v. County of Riverside (2023) 14 Cal.5th 910 (June 22, 2023)

The widow of a victim who was fatally shot by his neighbor brought action against the County of Riverside (County), alleging negligent infliction of emotional distress based on failure of the County's sheriff's deputies to promptly cover the victim's body, with genitals exposed, or remove the body from the scene while deputies investigated the shooting and searched for the shooter. The superior court granted summary judgment in favor of the County. The widow appealed, the court of appeal affirmed, and the widow appealed to the California Supreme Court of California (Supreme Court).

The Supreme Court unanimously held that section 821.6 of the Government Claims Act (Government Code section 821.6): (1) expands the scope of immunity to include any claim of injury caused by wrongful prosecution, even if the prosecution is merely negligent and not malicious; (2) protects public employees from liability *only for initiation or prosecution of official proceeding*; and (3) did not apply in the instant case, and thus, did not immunize the County from the widow's negligent infliction of emotional distress claim.

Section 821.6 immunizes public employees from liability for "instituting or prosecuting any judicial or administrative proceeding" within the scope of their employment, "even if" the employees act "maliciously and without probable cause." This provision immunizes public employees from claims of injury caused by wrongful prosecution. The Supreme Court concluded that "[w]hile other provisions of the Government Claims Act may confer immunity for certain investigatory actions, section 821.6 does not broadly immunize police officers or other public employees for any and all harmful actions they may take in the course of investigating crime."

In holding that law enforcement no longer has absolute immunity against being sued for maliciously or even negligently causing harm to anyone in the course of carrying out its investigations, the Supreme Court disapproved of at least 13 appellate court cases, all of which had conferred absolute investigative immunity for California law enforcement.

Because the claim does not concern alleged harms from the institution or prosecution of judicial or administrative proceedings, the Supreme Court found that section 821.6 did not apply to the matter before it. Accordingly, the Supreme Court reversed the judgment of the court of appeal and remanded the matter for further proceedings consistent with its opinion.

Political Activity of Public Employees

Progressive Democrats for Social Justice, et al v. Bonta (2023) 73 F.4th 1118 (July 19, 2023)

Government Code section 3205 generally prohibits local government employees in California from soliciting political contributions from their coworkers. It provides:

> (a) An officer or employee of a local agency shall not, directly or indirectly, solicit a political contribution from an officer or employee of that agency, or from a person on an employment list of that agency, with knowledge that the person from whom the contribution is solicited is an officer or employee of that agency.
>
> (b) A candidate for elective office of a local agency shall not, directly or indirectly, solicit a political contribution from an officer or employee of that agency, or from a person on an employment list of that agency, with knowledge that the person from whom the contribution is solicited is an officer or employee of that agency.
>
> (c) This section shall not prohibit an officer or employee of a local agency, or a candidate for elective office in a local agency, from requesting

> political contributions from officers or employees of that agency if the solicitation is part of a solicitation made to a significant segment of the public which may include officers or employees of that local agency.
>
> (d) Violation of this section is punishable as a misdemeanor. The district attorney shall have all authority to prosecute under this section.
>
> (e) For purposes of this section, the term "contribution" shall have the same meaning as defined in Section 82015.

State government employees are not similarly barred from soliciting contributions from their colleagues. There are limitations on their political fundraising: they may not solicit during work hours, and they may not use state resources, their titles, or their positions when fundraising. (See Government Code section 19990(a)— (b).) But there is no state law or regulation that categorically bars all forms of political solicitations among state workers.

Plaintiffs Progressive Democrats for Social Justice, a political organization, and Krista Henneman and Carlie Ware, two officers of that organization (collectively PDSJ), sued to challenge the constitutionality of Section 3205. Henneman and Ware were deputy public defenders for Santa Clara County who supported Sajid Khan, a fellow county deputy public defender, in his campaign to become district attorney. They wanted to solicit contributions for Khan from other county employees, particularly other public defenders, outside of work hours and without using county resources or titles. But Henneman and Ware determined, in accordance with a memorandum from Santa Clara County counsel, that individually soliciting donations from their coworkers would violate Section 3205. They therefore did not engage in the solicitations and instead filed this lawsuit challenging Section 3205 as unconstitutional. The complaint alleged that California's law violated the First Amendment and Equal Protection Clause by banning political solicitations among local employees but not among state employees.

Upon applying the balancing test set forth in *Pickering v. Board of Education* (1968) 391 U.S. 563, the district court granted the State of California's summary judgment motion. The court of appeal considered arguments on appeal. The court held that Section 3205 does not survive constitutional scrutiny under either the "closely drawn" standard enumerated in *McCutcheon v. FEC* (2014) 572 U.S. 185, or the balancing test articulated in *Pickering v. Board*

of Education (1968) 391 U.S. 563, and *United States v. National Treasury Employees Union* (1995) 513 U.S. 454. Because the statute's discrimination against local employees was not justified under any arguably applicable standard, the court held that Section 3205 is unconstitutional. Accordingly, the court reversed the district court's grant of summary judgment to the employer and remanded the case for further proceedings. One justice concurred only in the result. The concurring member argued that, since the state did not enact the law in its capacity as an employer, but rather in its capacity as a sovereign, the instant case should be analyzed under ordinary First Amendment principles.

Collective Bargaining Statutes: PERB Board Decisions

Dailey Elementary Charter School (2024) PERB Decision No. Ad-514 (April 18, 2024)

In the underlying administrative decision (AD), PERB's Office of the General Counsel (OGC) certified the Fresno Teachers Association (FTA) as the exclusive representative of all certificated teachers and other credentialed classroom support professionals at Dailey Elementary Charter School (Dailey). In the AD, OGC concluded that: (1) FTA submitted sufficient proof of support from a majority of employees in the proposed bargaining unit; (2) no other employee organization properly intervened to seek to represent any of the employees in the petitioned-for unit; (3) Dailey did not dispute that the proposed unit was appropriate; and (4) Dailey had not granted recognition to FTA. Thus, OGC certified FTA as the proposed unit's exclusive representative pursuant to section 3544.1 of the EERA and PERB Regulation 33485.

Severns, a teacher at Dailey, then submitted a letter purporting to appeal the AD. Severns asserted that there was no longer majority support for FTA. She also asserted that she properly filed a petition for intervention. In her purported appeal, Severns urged PERB to overturn the decision to certify FTA as the exclusive representative of teachers at Dailey. The Board affirmed the AD.

In its decision, the Board held that Severns did not properly file a petition for intervention. Severns filed her petition with PERB instead of with the employer as required by

PERB Regulation 33070. Severns' purported intervention was also untimely as the deadline for an intervention petition was fifteen (15) workdays from the date of the posting of the notice of petition for recognition. Further, Severns' petition lacked any proof of support which is required by PERB Regulation 33070. Finally, EERA limits intervention to an employee organization and Severns filed as an individual instead of an employee organization. For all these reasons, the Board affirmed the AD.

Merced City School District (2024) PERB Decision No. 2901 (April 25, 2024)

This dispute involves a unit modification petition (Petition) filed by the Merced City Teachers Association, CTA/NEA (MCTA) seeking to add twenty-one (21) unrepresented preschool teachers employed by the Merced City School District (District) to an existing unit of certificated District employees already represented by MCTA. After a PERB administrative hearing, the hearing officer denied the Petition, relying primarily on *Redondo Beach City School District* (1980) PERB Decision No. 114 (*Redondo Beach*). In his analysis, the hearing officer found that: (1) the preschool teachers did not share a community of interest with the existing bargaining unit, and (2) established practices and efficiency of operations weighed against modifying the unit. MCTA filed a statement of exceptions seeking to reverse the hearing officer's decision.

The Board began its decision by noting that EERA requires that employees be grouped in "appropriate" units for purposes of collective representation. The Board then addressed the two cases relied upon in the underlying decision: *Peralta Community College District* (1978) PERB Decision No. 77 (*Peralta*) and *Redondo Beach* (1980) PERB Decision No. 114 (*Redondo Beach*). In *Peralta*, the Board interpreted EERA section 3545 as creating a statutory presumption that all classroom teachers of a public school employer should normally be included in a single bargaining unit. This is known as the "*Peralta* presumption." Here, the District argued that preschool teachers are not "classroom teachers" within the meaning of EERA section 3545. In the proposed decision, the hearing officer declined to decide whether the preschool teachers are

"classroom teachers" and instead held that even assuming the preschool teachers are classroom teachers, the separate and distinct communities of interest of preschool teachers and elementary teachers outweigh the efficiency of operations and established practices criteria, rendering inclusion of preschool teachers in the certificated unit inappropriate. The Board disagreed with this line of reasoning and held that preschool teachers are classroom teachers. As such, the burden is on the District to demonstrate that the preschool teachers do not share a community of interest with the other employees in the bargaining unit.

Turning to *Redondo Beach*, MCTA argued that the hearing officer's reliance on this case was misplaced because it involved children's centers, which are wholly different from preschools. The Board agreed. Although sometimes described as preschool teachers, the Board held that the staff in *Redondo Beac*h were teachers at children's centers which are fundamentally different from the District preschools at issue here. The Board noted that as described in cases related to children's centers of the 1970s and 1980s, children's centers were more akin to daycares, serving children who ranged in age from six months to 12 years. According to the Board, "The basic purpose of the children's centers was to provide childcare services for parents who were working or participating in training programs for work, as the centers were part of a program offering job opportunities and training for recipients of public assistance." Here, in contrast, the District's preschools are similar to the District's TK program and to elementary classrooms more broadly. Accordingly, the Board held that the hearing officer erred when he relied on *Redondo Beach* to support the conclusion that the proposed modified unit lacks a community of interest.

State of California (State Water Resources Control Board) (2023) PERB Decision No. 2830-Sa (May 2, 2023)

The Board previously remanded this case to the ALJ to consider additional issues. Following remand, the ALJ issued a second proposed decision, concluding that the employer interfered with protected rights because it did not provide the union with sufficient information to allow meaningful representation of an employee during an investigatory interview. However,

the proposed decision included only a limited remedy requiring the employer to post a notice and to cease and desist from further interference with representational rights. The ALJ rejected the union's request for litigation sanctions and did not order the employer to rescind a three-month suspension it issued against the employee. The union filed exceptions arguing that the ALJ erred by rejecting its request for litigation sanctions and by not rescinding the employee's suspension.

With respect to the request to rescind the discipline, the Board affirmed that if an employer's unfair practice during an investigatory interview is one material cause of eventual discipline, the proper remedy is to rescind the discipline, purge related records, and make the employee whole, typically while leaving open whether the employer may lawfully re-investigate any alleged misconduct or issue lesser discipline. The primary basis for proving that unfair practices in an investigatory interview materially caused discipline is to show that the discipline was based, at least in part, on information or admissions obtained in the interview, or on employee conduct during the interview. Here, the Board affirmed that the union failed to meet its burden of proof because it could not show that any information or admissions obtained during the unlawful interview contributed to the employer's decision to suspend the employee.

As for the request for sanctions, the Board relied on its precedent requiring the party requesting sanctions to show that the opposing party pursued a frivolous argument in bad faith. Here, the Board found that the employer had raised non-frivolous arguments in its defense.

Imperial Irrigation District (2023) PERB Decision No. 2861-M (May 8, 2023)

On March 21, 2020, the Imperial Irrigation District (District) proclaimed a local emergency in response to the novel COVID-19 coronavirus. On March 26, the District notified the union of its plan to sequester a set of critical employees onsite at its facilities to ensure continued energy and water service to its communities. Negotiations began on April 8 and over the next ten (10) days, the parties exchanged several proposals and eventually narrowed their outstanding issues to only two, compensation and staffing methodology for sequestration if the District could not enlist a sufficient number of volunteers. However, on April 20, the District

implemented its sequestration policy, which impacted unit employees' terms and conditions of employment; for example, employees worked daily 12-hour shifts, followed by 12-hour non-productive periods, and resided at worksites in individual recreational vehicles the District provided. According to PERB, the District never returned to the bargaining table after implementation.

In the proposed decision, the ALJ concluded that the District refused and failed to meet and confer in good faith with the union over the sequestration policy and unilaterally implemented the policy. The Board affirmed.

Neither party disputed that the COVID-19 pandemic was a bona fide public health emergency. Under PERB precedent, an employer endeavoring to avail itself of the MMBA's emergency provision in 3504.5(b) must: 1) prove the existence of an actual financial or other emergency, and 2) that the emergency left the employer with no alternative to the action taken and allowed insufficient time for meaningful negotiations before taking action. The Board emphasized that because an emergency is not a static event, any changes taken in good faith reliance on a necessity defense should be limited to the timeframe that the emergency requires, and there remains an obligation to bargain in good faith as time allows.

Here, the Board held that the emergency exception to bargaining allowed the District to sequester employees temporarily to protect the public, but that the District acted outside the exception by: (1) altering compensation, which the emergency did not necessitate; and (2) failing to respond to the union's last proposal and instead abandoning negotiations altogether. Specifically, the Board held that the District failed to demonstrate that the emergency left it with no real alternative to altering the compensation framework before completing negotiations.

Mt. San Jacinto Community College District (2023) PERB Decision No. 2865-E (June 28, 2023)

In the underlying proposed decision, the ALJ found that a community college district (District) removed two faculty members as chairs of the Chemistry Department, refused to recognize their subsequent reelection as chairs, reassigned them to teach lower level classes for

the Fall 2020 semester, and issued two counseling documents, each in retaliation for protected activities including raising safety concerns and alleging that their removal as chairs was retaliatory.

The District filed exceptions, which included arguments that: (1) the faculty members' conduct was not protected by EERA; and (2) removal as chairs, refusal to reinstate as chairs, and assignment of Fall 2020 classes were not adverse actions.

As for protected activity, one of the arguments advanced by the District was that the emails alleged to be safety complaints were not protected because they were insubordinate. PERB affirmed that EERA allows employee and union speech on protected topics to be impulsive, intemperate, disparaging, or inaccurate, and thereby engender ill feelings and strong responses, unless the employer meets its burden to prove such speech was maliciously dishonest or so insubordinate, opprobrious, or flagrant as to cause substantial disruption in the workplace. Where an employer claims that speech was so flagrant or insubordinate flagrant as to cause substantial disruption in the workplace, PERB conducts a fact-intensive inquiry that considers all relevant circumstances, including but not limited to: (1) the place of discussion; 2) subject matter 3) nature what occurred; and 4) extent which speech or conduct at issue can fairly be said have been provoked by employer. PERB has also held that when speech occurs by text message, e-mail, social media, or in another manner other than face-to-face, there tends to be less likelihood of disruption.

Here, the Board found that each of these factors favor the protected nature of emails at issue. First, the safety concerns were sent via e-mail where they were unlikely to cause disruption. The subject matter was both the retaliatory reassignments and the change in schedule that negatively affected both faculty members and adjunct coworkers. Because the new schedule included changes to long-standing schedules, and to the typical faculty input into such changes, they were likely to engender strong feelings. Finally, the Board found that none of the statements at issue were insubordinate or disruptive on their face, or in context.

As for the adverse actions, the Board had little difficulty finding that removing the faculty members as chairs, refusing to acknowledge their subsequent reelection as chairs, and placing the faculty members as Introductory Chemistry instructors on the Fall 2020 schedule are adverse actions. PERB has found that a reasonable employee would view the loss of compensation, including paid release time, as an adverse action. Here, the Board found that the alleged actions deprived the faculty members of compensation, prestige, duties, and a voice in their working conditions which, by the District's usual practice, they would otherwise receive. Given these facts, the Board held that these actions constituted adverse actions.

City and County of San Francisco (2023) PERB Decision No. 2867-M (July 24, 2023), judicial appeal pending

At issue in this case is the Charter of the City and County of San Francisco (City) which contains provisions prohibiting municipal workers from striking and that, among other things, mandate termination of striking employees. The City asserted that the no-strike provisions were lawful because the Charter also required the City to submit to binding interest arbitration. The ALJ found that the Charter provisions conflict with the MMBA facially and as applied to the extent they prohibit striking, and that the City's home rule power does not exempt it from MMBA compliance. The Board affirmed.

In reaching its decision, the Board reaffirmed its belief that the MMBA provides employees with a right to strike. According to the Board, the MMBA provides that "[e]xcept as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (Government Code section 3502.) The Board has previously relied on this language to find a qualified right to strike.

The Board then addressed the City's argument that "any right to strike is not so absolute that it cannot be waived, whether as part of a collective bargaining agreement or a system of dispute resolution such as binding interest arbitration." In response, the Board held that contractual waiver will only be found based upon a bilateral agreement rather than a unilaterally

implemented policy. Here, the Board found that the record does not contain evidence demonstrating that the parties bilaterally agreed to implementing a permanent strike prohibition in the Charter. Because PERB requires a showing of volition to find any type of waiver, PERB held that the implementation of the no-strike provisions in the Charter cannot be construed as waiver.

Oakland Unified School District (2023) PERB Decision No. 2875 (October 16, 2023)

In the underlying unfair practice charge, the Oakland Education Association (OEA) alleged that the Oakland Unified School District (District) violated EERA by: 1) unilaterally changing its policy prohibiting it from implementing a school closure, merger, or consolidation without a planning period lasting at least nine months following a vote to approve the action, unless stakeholders at the impacted school(s) propose a faster timeline; and 2) implementing a school closure decision without affording OEA adequate notice and opportunity to engage in good faith effects negotiations. The ALJ's proposed decision dismissed the first claim while sustained the second. The District filed exceptions to the proposed decision.

In its decision, the Board held that the ALJ incorrectly evaluated the District's policy as an *unwritten* past practice whereas the District's policy as actually in writing. PERB has held that an unwritten past practice can only establish the status quo if it was "regular and consistent" or "historic and accepted." However, for written past practices, PERB has held that a change can be established if there is a change written policy, a newly implemented written policy, and/or enforcement of the policy in a new way. However, the Board held that there is a difference between a written policy and a written agreement between the parties in that repudiating an agreement during its term can establish unlawful conduct even if the underlying topic is a non-mandatory subject of bargaining. Here, the District's policy of providing nine (9) months' notice of a school closure provided time for OEA to bargain over alternatives and provide notice to employees to plan their lives. Thus, while the District did not have to adopt a policy on notice, once it did that policy became the status quo.

Regents of the University of California (2023) PERB Decision No. 2884-H (December 6, 2023)

This case involves a group of employees—Administrative Officer II's (AO2's)—who were accreted into an existing bargaining unit represented by Teamsters Local 2010 (Teamsters) at the University of California (UC). At the time of accretion, the UC and Teamsters were parties to a collective bargaining agreement (CBA) in effective from 2017 through 2022. The CBA contained a provision allowing the UC to offer, at its discretion, Incentive Award Programs (IAPs) at its medical centers. All the UC's medical centers offered some form of an IAP but the criteria and amounts awarded varied among represented and unrepresented employees. At issue here was that the AO2's would potentially receive lower awards as represented employees under the IAP at 3 locations. Teamsters argued that this constituted an unlawful unilateral change in the terms and conditions of employment and/or unlawful discrimination.

With respect to the unilateral change allegation, the UC argued that PERB should follow *Baltimore Sun* Co. (2001) 335 NLRB 163 (*Baltimore Sun*), in which the National Labor Relations Board held that an existing CBA should immediately apply to newly accreted employees, but that the parties must bargain over "how" to apply the CBA to the new employees. Given the unique nature of the public sector, the Board declined to adopt *Baltimore Sun* but rather used it as a starting point for its holdings.

The Board ultimately concluded that an employer must normally afford newly added employees all CBA-mandated wage adjustments. However, if it is unclear how one or more of the CBA's adjustments apply to the newly added employees, then the status quo for that cycle is the adjustments the newly added employees would have received had they remained unrepresented. Because the CBA left the terms of any IAP to the UC's discretion, the UC did not commit an unlawful unilateral change by applying the IAP terms for represented employees to the AO2's upon their accretion.

As for the discrimination claim, the Board noted that the complaint only alleged discrimination at the three (3) medical centers where all represented employees were treated the same. The complaint did not allege any broader discrimination challenging disparate treatment

between represented and unrepresented employees under the IAPs. Accordingly, the Board dismissed the "narrow" discrimination claim as the UC treated that AO2's similarly to all other Teamsters' represented employees at the three (3) medical centers.

City of Stockton (2023) PERB Order No. Ad-507-M (December 21, 2023)

The issue in this case was whether the Operating Engineers Local Union No. 3, AFL-CIO (OE3) timely filed a request for factfinding under the MMBA. The parties started bargaining on March 13, 2023. On July 7, 2023, prior to the declaration of impasse by either party, the parties jointly requested that PERB's State Mediation and Conciliation Service (SMCS) assign a mediator. A mediator was assigned the same day. A mediation session was scheduled for August 4.

On July 24, 2023, the City issued its last, best, and final offer. On July 31, 2023, the City sent OE3 a written declaration of impasse. Because the City's local rules require an impasse meeting, the City proposed using the August 4 mediation session to satisfy that requirement. On September 14, exactly 45 days after the City's written impasse declaration, OE3 filed its request for factfinding.

The Board began its decision by noting that under the MMBA there are two (2) alternate deadlines for a union to request finding: 1) not sooner than 30 days, but not more than 45 days, following the appointment of a mediator; or 2) if the dispute was not submitted to mediation, not later than 30 days following the date of a written notice of impasse. Here, OE3 did not claim to that its factfinding request was timely under the second prong which requires a request to be filed not later than 30 days following written notice of impasse.. Instead, OE3 argued that it properly filed a factfinding request between 30 and 45 days following the appointment of a mediator. While OE3 acknowledged that a mediator was appointed on July 7, OE3 argued that the appointment of a pre-impasse mediator does not trigger a right to request factfinding. OE3 then argued that the Board should find that the mediator was "constructively reappointed or

reselected" when the City declared impasse on July 31. Under such a theory, OE3 argued that its request for factfinding 45 days after the written declaration of impasse would be timely..

In its decision, the Board agreed that "appointment or selection of a mediator" under Government Code section 3505.4 must mean appointment or selection of a *post-impasse* mediator. The Board also agreed that OE3's argument that there was a constructive reappointment or reselection would be correct in a case where an employer and a union agreed to use a pre-impasse mediator to fulfill a post-impasse mediation process required pursuant to local rules or negotiation ground rules. According to the Board, in such a case the mediator selected pre-impasse takes on a legally significant new role after impasse, which amounts to a constructive reappointment or reselection. Here, however, the Board noted that mediation was voluntary under the City's local rules. As such, the Board held that, "It is therefore difficult, in the absence of any actual reappointment or reselection, to find that reappointment or reselection occurred as a matter of law merely because the mediator SMCS appointed on a pre-impasse basis did not end up meeting with the parties until after impasse. Finding July 31 to have been a constructive reappointment date would inject uncertainty into the rules, leading to confusion as to what circumstances might be sufficient to qualify as constructive reappointment." Accordingly, the Board held that the parties' voluntary selection of a mediator pre-impasse cannot be construed as a post-impasse mediation under these facts.

State of California (California Correctional Health Care Services) (2024) PERB Decision No. 2888-S (February 8, 2024), judicial appeal pending

The underlying unfair practice charge in this matter alleged the State of California (California Correctional Health Care Services) (CCHCS) violated the Dills Act by: (1) denying a request for union representation that CCHCS pharmacist Sean Kane (Kane) made during a meeting with his supervisor on November 4, 2020; and (2) terminating Kane in retaliation for protected activities, including Kane's work as a job steward for his union, American Federation of State, County and Municipal Employees, Local 2620 (AFSCME). Kane also challenged his

termination before the State Personnel Board which reduced his termination to a one-month suspension. At PERB, the ALJ found that CCHCS violated the Dills Act both by denying Kane union representation at the November 4 meeting and by later terminating him in retaliation for protected activities. However, the ALJ partially agreed with CCHCS on its affirmative defense to the retaliation claim, finding that it would have suspended Kane for at least one month based on his proven misconduct, even had he not engaged in protected activities. The ALJ's proposed remedy therefore matches SPB's remedy: that CCHCS must reduce Kane's penalty to a one-month suspension.

On exceptions by both parties, the Board reversed, in part, the ALJ's findings. Regarding the request for union representation, the Board began its discussion by affirming the well-established rule that, "An exclusive representative has the right to represent a bargaining unit employee, and the employee has a corresponding right to union representation, during an investigatory meeting that the employee reasonably believes might result in discipline, as well as in non-investigatory meetings held under other 'highly unusual 17 circumstances.'" The Board also affirmed that, "… representational rights normally do not arise during a routine conversation in which a supervisor corrects work technique or gives instruction, assignment, direction, or training." In this case, the meeting in question initially arose because Kane's supervisor wanted to discuss routine work matters. During the course of the meeting, the two of them began discussing information requests and eventually the supervisor accused Kane of behaving insubordinately. However, the Board held that Kane's supervisor never discussed the specifics of any information requests, and therefore, that discussion did not transform the meeting into an investigatory one. The Board held that it was a closed question once Kane asked for union representation and his supervisor accused him of being insubordinate. If the discussion had continued about whether Kane was insubordinate, the Board held that Kane would have become entitled to a union representative. But since the meeting ended, there was no right to representation. Accordingly, the Board reversed the ALJ on this issue.

Regarding Kane's termination, the Board held that claim preclusion does not apply when PERB resolves a Dills Act discrimination charge after the State Personnel Board (SPB) has already issued a final decision as to whether the state had adequate cause to issue discipline. However, the Board acknowledged that *issue* preclusion may apply in these situations. After examining the facts in this case, the Board held that while SPB considered whether Kane's conduct constituted adequate cause for discipline, and, if so, the appropriate remedy for such conduct, SPB did not consider whether Kane's protected activity under the Dills Act was a motivating or substantial factor in the decision to terminate him. Nor did SPB consider what CCHCS would have done in the absence of protected activity.

While the Board affirmed the ALJ's conclusion that CCHCS would not have dismissed Kane absent his protected activities, the Board held that the ALJ jumped too quickly to the conclusion that, absent protected activity, CCHCS would have suspended Kane for at least one month. According to the Board, what is missing is evidence regarding other employees who have received adverse actions for similar conduct, and the penalty imposed, particularly on an employee who had no previous adverse actions. "To make an informed determination, the ALJ should have asked both parties to introduce evidence of management's response to similar misconduct by other employees."

Given the unique circumstances of this case, the Board ordered that this case first be referred to mediation with the State Mediation and Conciliation Service. Absent a settlement, the Board remanded the case to the ALJ to reopen the record on the limited issue of what level of discipline CCHCS would have issue absent Kane's protected activities.

Kern County Hospital Authority v. Public Employment Relations Board (2024) PERB Decision No. 2847-M (December 20, 2022), affirmed in *Kern County Hospital Authority v. Public Employment Relations Board* (2024) 100 Cal.App.5th 860 (February 26, 2024)

Service Employees International Union, Local 521 (SEIU) filed an unfair practice charge against the Kern County Hospital Authority (Authority) alleging that the Authority's refusal to allow SEIU's motion to amend a grievance to make it a class grievance amounted to a unilateral

change from the parties' past practice of consolidating grievances and adjudicating group and class grievances.

PERB concluded that by declaring that the MOU bars group or class grievances and granting itself unilateral authority to refuse to consolidate grievances, the Authority violated the MMBA by unilaterally adopting a new policy and applying or enforcing existing policy in a new way, without affording SEIU notice and an adequate opportunity to bargain. In its decision, the Board affirmed that a union has a statutory right to initiate grievances on its own behalf and on behalf of named and/or unnamed employees in the bargaining unit and found that the MOU did not clearly and unmistakably reflect a waiver of this right by SEIU.

In determining that the Authority made an unlawful unilateral change, the Board applied the *Bellflower* test, which provides that the charging party union must prove: "(1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing adequate advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse." (*Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9 (*Bellflower*).)

In finding that the Authority changed or deviated from the status quo, the Board applied another *Bellflower* test, which provides that there are three primary means of establishing that an employer changed or deviated from the status quo: "(1) deviation from a written agreement or written policy; (2) a change in established past practice; or (3) a newly created policy or application or enforcement of existing policy in a new way." (*Bellflower, supra,* PERB Decision No. 2796 at p. 10.)

The Board made a narrow determination to the effect that the MOU was ambiguous and there was no clear rule or policy prior to the Authority's refusal to allow SEIU's motion to amend a grievance to make it a class grievance, meaning that as of the date of said refusal, the

Authority implemented a new rule, or enforced or applied an existing rule in a new way, in asserting that it could categorically and unilaterally reject group, class, and consolidated grievances.

The Board rejected the Authority's argument that the MOU implicitly disallows group and class grievances by defining a grievance as a "complaint by an employee" and using other similar singular phrasing. The Board reasoned that only clear and unambiguous MOU language can bar a union from pursuing collective relief through a grievance, and an MOU does not satisfy that standard where it merely defines the grievant as a singular "employee" and does not explicitly exclude group and class grievances.

In interpreting the MOU's grievance provisions, the Board also considered other provisions of the MOU – one of which, the Board found, would be rendered superfluous by the Authority's position and thereby violate fundamental principles of contract interpretation – as well as the parties' past conduct, where the Board found one instance where the Authority addressed SEIU's ability to pursue a group, class, or consolidated grievance, but in that example, the Authority did not assert a categorical right to reject group, class, or consolidated grievances.

Addressing the Authority's affirmative defense of waiver, the Board applied the following test: waiver of the right to meet and confer may be stablished only by: (1) clear and unmistakable language in the parties' collective bargaining agreement; or (2) demonstrable conduct or past practice showing that the waiving party knowingly and voluntarily yielded its interest in the matter. (*City & County of San Francisco* (2017) PERB Dec. No. 2388-aM, p. 37; *City of Palo Alto* (2017) PERB Dec. No. 2388-aM, p. 37.) The Board emphasized that any doubts must be resolved against finding waiver. (*County of Merced* (2020) PERB Dec. No. 2740-M, p. 10.)

The Board found that the Union had not contractually waived its right to bargain because the grievance and arbitration provisions of the MOU were ambiguous with respect to the status of group, class, and consolidated grievances.

Regarding waiver by inaction, the Board explained it is necessary to prove conscious abandonment of the right to bargain, and that showing that a union abandoned its right to bargain typically involves proof that the union had clear notice, meaning advance knowledge, of the employer's intent to change policy with sufficient time to allow a reasonable opportunity to bargain about the change and then failed to request negotiations.

While the Authority argued that SEIU waived its right to bargain by not demanding to bargain in the one instance described herein (four paragraphs above), the Board explained that if the Authority's response had announced a new policy, that would have triggered the statute of limitations on filing a unilateral change charge. However, the Board noted that announcing a new policy as a fair accompli would not trigger a duty to demand bargaining and cannot support a waiver defense.

The Board explained:

> Thus, waiver and timeliness normally apply in separate circumstances: announcing a fait accompli can trigger the statute of limitations for a unilateral change charge but cannot support a waiver by inaction defense, while proposing a new policy does not trigger the statute of limitations but can lead PERB to find waiver by inaction if the union does not respond to the proposal within a reasonable time.

The Authority filed a petition for writ of extraordinary relief with the court of appeal. The court of appeal affirmed the Board's decision in a published decision.

Service Employees International Union, Local 1021 v. City & County of San Francisco (2024) PERB Decision No. 2891-M (February 27, 2024)

Service Employees International Union, Local 1021 (SEIU) filed an unfair practice charge against the City and County of San Francisco (City) alleging that the City violated the MMBA by refusing to provide certain requested information.

The ALJ sustained SEIU's claim. Both parties filed exceptions. The City alleged that the ALJ erred in requiring the City to provide disaggregated race/ethnicity data (data of individual employees, as opposed to aggregated data for numerous unidentified employees), while SEIU

alleged that greater remedies should be awarded. The Board upheld the ALJ's decision, finding that neither party succeeded in its exceptions.

The Board reiterated the long-standing rule that an exclusive representative is entitled to all information that is necessary and relevant to its right to represent bargaining unit employees regarding mandatory subjects of bargaining. The terms "necessary" and "relevant," the Board noted, "are interchangeable terms that do not have separate meanings." The Board held that "[r]ace/ethnicity information is relevant because of unions' critical role in working to prevent and mitigate employment discrimination."

However, the City did not dispute the relevance of the data, but rather refused to provide it in disaggregated form because it believed doing so would infringe on privacy rights. By refusing to provide the information without offering to bargain in good faith over accommodating all relevant interests, the Board found that the City violated its duty to bargain in good faith.

The Board explained that "a union's unique representational functions may allow it a right to sensitive or confidential information," and that when an employer believes that a union has sought confidential information, an employer must negotiate in good faith over potential accommodations. The Board explained that "among other possibilities, the parties may enter into a confidentiality agreement or other arrangement in which the requesting union agrees to limit its use of the information to a particular purpose, and to disclose such information to union employees or attorneys only if necessary for that purpose."

If the employer instead unilaterally refuses to provide allegedly confidential information without offering to bargain in good faith over accommodating all relevant interests, it is liable for a violation without the need for further analysis. This was the case here, but to provide guidance on the issues at stake, the Board continued with the analysis as if the City had offered to bargain.

The Board explained that even if the employer offers to bargain, and it bargains in good faith to the extent requested, a union may still file an unfair practice charge for the failure to

provide necessary and relevant information, but the focus of the charge then becomes the substantive merits of the request for information and the privacy claim.

PERB applies a balancing test when an employer raises a significant privacy interest – which, per the Board, means "a legally protected interest that the RFI invades in a manner that is serious in both its nature and its scope." Under that test, the employer has the burden to demonstrate that the privacy interest outweighs the union's informational need.

First, the Board found that the City failed to demonstrate that Title VII requires it to keep race and ethnicity information confidential. Second, the Board made clear that California Public Records Act (CPRA) defenses do not apply to Requests for Information (RFIs) arising under a labor relations statute. Lastly, in analyzing the City's Charter, ordinances, policies and practices, the Board noted that if harmonizing them with the MMBA principles explained herein above were not possible, the MMBA would preempt any conflicting local regulation or policy.

Regarding the remedy, the Board upheld the ALJ's proposed remedy requiring the City to provide SEIU with the 2016-2019 information it sought, including disaggregated race/ethnicity data. The Board also required the City to provide a current version of the data, if requested by SEIU.

However, the Board rejected the additional two remedies that SEIU sought in its exceptions.

First, SEIU sought an order to direct the City to alter its forms, practices, or policies relevant to soliciting race/ethnicity information. The Board rejected this remedy on two grounds: (1) SEIU filed no exceptions regarding the ALJ's decision to dismiss the complaint's unilateral change and direct dealing claims; and (2) PERB "need not order changes to forms, policies, or practices to effectuate the MMBA's purpose of providing SEIU with the information it needs to perform its statutory purposes."

Second, SEIU sought litigation expenses from the case and/or from the arbitration proceeding regarding its discrimination grievance. The Board explained that "a party to a PERB matter seeking litigation expenses based upon its attorneys' fees and costs in that matter must

normally prove that its opponent maintained a claim, defense, or motion, or engaged in another action or tactic, that was without arguable merit and pursued in bad faith."

However, PERB applies a different standard when deciding if a respondent found to have committed an unfair practice must pay attorneys' fees and costs related to a separate proceeding. Such a remedy is obtainable if a charging party "has engaged in the separate proceeding in material part to remedy, lessen, make up for, or stave off the impacts of the unfair practice." Similarly, the Board noted that it directs payment of "a charging party's salaries or other bargaining and/or representation costs incurred in material part due to an unfair practice, even absent a separate proceeding." "In either of those contexts," the Board explained, "make-whole relief is proper if the charging party proves that the respondent's unlawful conduct caused harm and it is reasonably feasible to estimate the impact thereof."

Here, the Board found no cause for compliance proceedings on potential monetary relief, reasoning that SEIU kept the case in abeyance for 18 months and removed the case from abeyance after the arbitrator issued a decision rejecting SEIU's grievance, which guaranteed that the arbitration would finish before the PERB hearing began.

California Nurses Association and Caregivers & Healthcare Employees Union v. Palomar Health (2024) PERB Decision No. 2895-M (March 15, 2024), judicial appeal pending

California Nurses Association (CNA) and Caregivers & Healthcare Employees Union (CHEU) (collectively, Unions) filed an unfair practice charge against Palomar Health (Palomar) alleging that Palomar violated the MMBA by: (1) maintaining an enforcing an unreasonable access rule via its Solicitation & Distribution Policy; (2) engaging in unlawful surveillance; (3) unilaterally changing its past policy or practice to disallow the Unions access to certain non-patient care areas by filing a lawsuit to enjoin the Unions from being present in these areas; and (4) interfering with protected rights by filing that lawsuit.

The ALJ found in favor of the Unions on the first two claims but dismissed the latter two allegations.

After the proposed decision issued and while the parties' exceptions were pending, the court of appeal remanded the lawsuit to the trial court with an order to dismiss it for lack of jurisdiction on the basis that the lawsuit is preempted by the MMBA and subject to PERB's exclusive jurisdiction.

First, the Board held that Palomar's Solicitation & Distribution Policy was unreasonable both facially and as applied. The policy specified that "[p]ersons not employed by the Palomar Health may not solicit or distribute literature or written material on Palomar Health property at any time for any purpose."

The Board explained that "[a]n employer must allow an exclusive representative reasonable access to employer property to communicate with bargaining unit employees, distribute literature, investigate workplace conditions, and assess contractual and statutory compliance." Under each PERB-administered labor relations statute, the Board explained, both unions and employees engage in protected activity when they engage in nondisruptive picketing or leafleting to advertise a labor dispute.

The Board relied on the test in *County of San Joaquin* which provides that "[a]n employer bears the burden of proving that a restriction on access to its premises is: (1) necessary to safe or efficient operations; and (2) narrowly drawn to avoid overbroad, unnecessary interference with protected rights." These principles, the Board explained, "apply irrespective of whether the person seeking access is a bargaining unit member or a union representative who does not work for the employer." "In assessing an employer's claim that it has narrowly tailored its rule to a particularized operational need, PERB considers whether the rule allows access to alternative venues that are a reasonable substitute for the restricted venue."

While Palomar's policy is neutral – in that it bans all solicitation and distribution, whether union or otherwise – the Board found it unlawful because it is not limited to patient care areas and prohibits union representatives from engaging in solicitation and distribution in nonwork areas and during nonwork times. Palomar offered an employee parking lot option as an alternative venue, but the Board found that it did not qualify, and would not qualify, as a

reasonable alternative because it was a half-mile away, the alternative was admittedly barred by the written policy, and that parking lot was defunct at the time of hearing.

Moreover, the Board found that Palomar did not meet its burden to demonstrate a waiver as a defense to its policy. The Board was unconvinced that the Unions' respective CBAs – which stated that each shall designate up to two (2) authorized representatives who shall be granted access to facilities during hours of operation for the purposes of ensuring compliance with the CBA, adjusting grievances, and updating union bulletin boards – waived their statutory right to leaflet or table in front of the main entrance and in the third-floor cafeteria and the first-floor patio area.

The Board reiterated that a waiver of statutory rights must be "clear and unmistakable" and that the evidence must demonstrate an "intentional relinquishment" of a given right. It further explained that a waiver of statutory rights may only apply "as long as the restriction does not seriously impair employees' right to communicate about union matters." (citing *Omnitrans* (2009) PERB Decision No. 2030-M, p. 21.) Here, the Board found both that Palomar's restriction did so seriously impair protected rights to communicate and that the language of the CBA did not evidence a waiver.

Second, the Board found that Palomar made an unlawful unilateral change to its access policies when it deviated from the status quo by changing past practice and/or by enforcing an existing policy in a new way. The Board relied on the *Bellflower* test in *Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9-10.

The Board found that the Unions regularly engaged in protected conduct in the areas they had previously been permitted to access, and that the past practice was sufficiently "regular and consistent (or alternatively 'historic and accepted') to constitute an established practice." Even if the record did not establish such a past practice, the Board explained, "Palomar created a new policy or applied or enforced policy in a new way when it for the first time sought to block the Unions from non-patient areas."

Additionally, the Board found that Palomar was not excused from a finding that it made a unilateral change on the basis that one of its means of asserting that change was to seek enforcement of its policy via the lawsuit referenced herein above. The Board explained that "a unilateral change does not occur at the point the change takes effect but at the point when the employer decides to make a change, regardless of whether the employer falls short of implementation" and that "[t]he triggering event for notice and an opportunity to bargain is therefore the employer's firm decision to make a change." Palomar evidenced its change in policy, the Board reasoned, by confronting union representatives engaged in protected activity, evicting them from locations they had previously been permitted to access, and pursuing related litigation.

Third, the Board found that Palomar interfered with protected rights via its unlawful surveillance, where: (1) Palomar security employees photographed union representatives leafletting in front of the main entrance to the medical center; and (2) a Palomar security officer placed a two-way radio on a table during a union meeting.

The Board relied on NLRB case law in assessing the lawfulness of employer surveillance of protected activity. NLRB caselaw provides that an employer engages in unlawful surveillance when it photographs or videotapes employees or openly engages in recordkeeping of employees participating in union activities, however, the mere observation of open, public union activity on or near the employer's property does not constitute unlawful surveillance. (citing *Lake Tahoe Unified School District* (1999) PERB Decision No. 1361, adopting warning letter at p. 2.)

The Board found that taking the photographs tended to cause at least slight harm to employee rights and therefore, absent a legitimate business justification, interfered with employee rights under the MMBA. Palomar argued both that the photography is justified as necessary to gather evidence, because it believed that union organizers were engaged in misconduct, and that the superior court judge presiding over a portion of its lawsuit requested evidence of the leafletting. The Board rejected these defenses, as "[d]ocumenting a violation of an unlawful policy cannot be a cognizable justification for engaging in surveillance."

Addressing the superior court judge's request defense, the Board found that Palomar waived it by not raising it to the ALJ and that even if it had not been waived, the record showed that Palomar directed the photographs before the judge's request and the superior court judge specifically contemplated that Palomar had existing or ongoing security camera footage – not photographs taken by security officers. Even if the Board accepted that the superior court judge's request gave Palomar some reason to photograph protected activity, the Board found that balancing the asserted business need against the tendency to harm protected rights tips in favor of finding the harm outweighs Palomar's justification.

Regarding the two-way radio, Palomar argued that because the Union failed to prove the radio was recording or transmitting, the ALJ's finding was in error. The Board disagreed, explaining that "precedent does not require proof of actual surveillance to sustain a violation," rather, "an employer violates an employee's right to engage in protected activity if it creates the impression among employees that it is engaged in surveillance."

Fourth, the Board found that Palomar interfered with protected rights when it filed its lawsuit because the entirety of the lawsuit was without any reasonable basis and for an unlawful purpose.

Where an interference or retaliation allegation is based upon litigation-related conduct, the Board explained that PERB applies the principles articulated in *Bill Johnson's Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731 (*Bill Johnson's*) and thereby follows "a qualified litigation privilege that preserves parties' ability to litigate colorable legal rights while disallowing baseless, bad faith conduct that tends to harm protected labor rights." (*Victor Valley Union High School District* (2022) PERB Decision No. 2822, p. 10.) Under those principles, the charging party must prove that the respondent acted without any reasonable basis and for an unlawful purpose or with a retaliatory motive. "A party acts without any reasonable basis if it either takes a position that is plainly foreclosed as a matter of law or has not presented evidence raising genuine issues of material fact, or mixed questions of law and fact, that could allow it to prevail." (*Bill Johnson's, supra,* 461 U.S. at pp. 745-747.)

The Board found that the lawsuit had no colorable claims, as Palomar did not have any reasonable basis to believe that the Unions had trespassed or engaged in unlawful picketing, or to seek a total ban of the Unions from the medical center for any and all purposes. The Board reasoned: (1) "[t]hat the access rights Palomar seeks to label as 'trespass' are so fundamental, and that Palomar did not interpret the CBAs to exclude leafletting and tabling at any point before Spring 2022, cements that it had no colorable trespass claim"; (2) "no documentary evidence or witness account supports that any of the activities the Unions engaged in were 'unlawfully disruptive' or 'caused obstruction to the ingress and egress to [the medical center] in violation of state law"; and (3) the requested remedy of the lawsuit – which included an order preventing the Unions and their representatives from being present for any purpose inside or outside the medical center other than in the employee parking lot – "is egregiously overbroad in that it would totally ban the Unions from [the medical center], even for contractually enumerated and statutorily protected purposes."

Regarding unlawful purpose, the Board found that "preventing union representatives from impeding the entrance and exit was not Palomar's motive, or at least its main motive, for pursuing the lawsuit." It reasoned that Palomar provided no credible evidence that union representatives were impeding the entrance and exit of anyone. Addressing Palomar's remaining justification for pursuing the lawsuit – because union representatives handed out flyers to individuals entering and exiting the medical center that Palomar alleged "disparage[d]" or "demean[ed]" Palomar and its leadership – the Board found that "Palomar failed to prove or even argue that these flyers lost the protection of the MMBA." It further reasoned that Palomar never objected to the Unions' leafletting and tabling before Spring 2022.

Lastly, the Board addressed the Unions' argument that the lawsuit interfered with protected rights because it was preempted.

While the Board found that the Unions' arguments regarding preemption would have no impact on the outcome and that it need not resolve them – because the Unions were entitled to

reimbursement of litigation expenses from the outset of the lawsuit – it explained the current state of the law relative to determining the point in time at which a lawsuit is preempted.

The Board explained that "PERB's jurisdiction preempts a court's jurisdiction if the conduct at issue is 'arguably protected' or 'arguably prohibited' by a labor relations statute administered by PERB and the controversy presented to the state court 'may fairly be termed the same' as that presented to PERB."

Under the arguably protected prong, "preemption is triggered by the issuance of a complaint by the General Counsel, if not earlier." (*Davis Supermarkets v. NLRB* (D.C. Cir. 1993) 2 F.3d 1162, 1179.) The Board explained that "California precedent generally interprets *Sears* in the same manner as the D.C. Circuit," with *Sears* being a United States Supreme Court split decision that, as explained by the NLRB, "seems to indicate that the state suit is preempted at least by the time the General Counsel has acted to place the issue before the Board by issuing a complaint." (*Loehmann's Plaza* (1995) 316 NLRB 109, 669-670; *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters* (1978) 436 U.S. 180.)

"In contrast," the Board explained, "under the 'arguably prohibited' preemption prong, it may be the employer's decision whether to file an unfair practice charge, and precedent is clear that the employer cannot avoid the preclusive effect of PERB jurisdiction by deciding to file in court rather than at PERB."

Here, the court of appeal found it relevant that PERB had issued a complaint, but the court did not decide the earliest point at which the lawsuit was preempted. It was unclear why the court left that issue open, the Board explained – because it would not impact the ultimate order of dismissal, because the court accounted for the possibility that the dissenting justices in *Sears* were correct, or because the "arguably protected" prong applies given that Palomar could have filed a PERB charge alleging that the Unions committed a unilateral change by allegedly violating contractual access provisions – and thus, it declined to decide what the court left open.

The court of appeal explained that the conduct at issue – alleged trespass and leafletting at the hospital's entrance – will be adjudicated by PERB as either protected or unprotected, and

that because that is the identical question presented before the trial court, "[t]here is unquestionably a risk of conflicting decisions in these two competing forums." The court of appeal reasoned that unlike the private employer in *Sears*, whose property was subject to state trespass law, the Unions have a presumptive right of access to their members' workplace under the MMBA, and given this right of access enjoyed by the Unions, coupled with the fact that they immediately filed their unfair practice charge with PERB, it concluded that the risk of interference with PERB's jurisdiction is much greater than the risk of interference with the NLRB's jurisdiction at issue in *Sears.*

The Board found that the ALJ properly concluded that a make-whole award for the Unions must include legal expenses "because the Unions would not have incurred the costs of defending against the Lawsuit absent Palomar's unlawful conduct, viz. interfering with protected rights by pursuing the lawsuit." The Board explained that it does not require a Rule 11 (of the Federal Rules of Civil Procedure) type showing in cases "when a party seeks to be made whole for legal expenses it reasonably incurred in a separate proceeding to remedy, lessen, or stave off the impacts of the other party's unfair practice"; instead, it treats "legal expenses the same as medical expenses, lost pay, lost staff time, or any other loss."

However, the Board declined to award legal expenses the Unions incurred during the course of the PERB proceeding as a litigation sanction. The Unions argued for litigation sanctions on the basis that the proposed decision found that Palomar's issue-preclusion argument, made in its Motions to Strike and in its post-hearing brief, was misleading. The Board rejected this remedy on the basis that it found insufficient evidence to conclude its conduct constitutes bad faith, "including because Palomar did not repeat its issue preclusion argument on exceptions to the Board."

Service Employees International Union Local 521 v. County of Santa Clara (2024) PERB Decision No. 2900-M (April 23, 2024)

Service Employees International Union Local 521 (SEIU) filed an unfair practice charge against the County of Santa Clara (County) alleging that the County violated the MMBA by

refusing to meet and confer with SEIU before its Board of Supervisors (BOS) approved the County medical staff organization's proposed bylaw revisions, which included new standards for SEIU-represented physician assistants (PAs) to receive or maintain practice privileges at County hospitals. Specifically, the bylaw revisions at issue require PAs to earn and maintain *both* a license and a certificate or other credential to have practice privileges.

The Board found that the County violated its bargaining duties both with respect to the BOS decision and the effects thereof, however, the Board rejected SEIU's suggested change to PERB precedent on litigation expenses.

The County owns and operates Santa Clara Valley Healthcare (SCVH), which includes three acute care hospitals and various outpatient clinics. The BOS serves as the governing board of SCVH. California law requires SCVH to have an "organized medical staff," meaning that acute care hospital physicians, dentists, podiatrists, and clinical psychologists have certain self-government rights through their medical staff organizations. (Health & Safety Code, sections 1250(a), 32128(a); Business & Professions Code, section 2282; California Code of Regulations, title 22, section 70701(a)(1)(F).) A medical staff organization's bylaws, rules or regulations must establish criteria and standards for medical staff membership and practice privileges, and such bylaws, rules, and regulations are subject to approval by the hospital's governing board, but the board may not unreasonably withhold approval. (Business & Professions Code, sections 2282.5(a)(1), 2282.5(a)(6); California Code of Regulations, title 22, sections 70701(a)(8), 70703(b).) The SCVH medical staff organization is called the Enterprise Medical Staff (EMS), and its executive committee is called the Enterprise Medical Executive Committee (EMEC). The practice privilege criteria in the EMS bylaws apply to all medical providers wishing to practice at SCVH, including PAs, who are Allied Health Professionals (AHPs), which means they are non-physicians who render services to patients pursuant to physician supervision.

The Board found that the County must bargain, to the extent of the discretion vested in its BOS, over bylaw revisions on AHP practice privileges (which fall within the scope of

representation), and that while the scope of negotiations may be more constrained than in other negotiations, this constraint does not permit the County to flatly refuse to bargain.

PERB applies the *Richmond Firefighters* framework as the first step in determining whether a matter falls within the scope of representation – where precedent does not already delineate that it does. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259 (*Richmond Firefighters*).) Under this test, the matter is placed in one of three categories: (1) "decisions that 'have only an indirect and attenuated impact on the employment relationship' and thus are not mandatory subjects of bargaining" (e.g., advertising, product design, and financing); (2) "decisions directly defining the employment relationship, such as wages, workplace rules, and the other of succession of layoffs and recalls," which are "always mandatory subjects of bargaining"; and (3) "decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve 'a change in the scope and direction of the enterprise' or, in other words, the employer's 'retained freedom to manage its affairs unrelated to employment.'" (*City and County of San Francisco* (2022) PERB Decision No. 2846-M, pp. 15-18 (*San Francisco I*).)

Further analysis is necessary only if a decision falls into the third category, in which case, PERB first determines whether the decision has a significant and adverse effect (from the perspective of a reasonable employee) on the wages, hours, or working conditions of the bargaining unit employees that arises from the implementation of a fundamental managerial or policy decision. (*San Francisco I, supra,* PERB Decision No. 2846-M, pp. 17-18.) If there are such significant and adverse effects, PERB then determines "whether the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*County of Sonoma* (2023) PERB Decision No. 2772a-M, pp. 14 & 23.)

The Board explained that most types of decisions do not require PERB to apply the *Richmond Firefighters* framework from scratch, because precedent establishes subject-specific

standards that reveal how the framework applies to a given topic. One such standard is "that job qualifications fall within the scope of representation unless the employer does no more than comply with an externally imposed change." (*County of Sacramento* (2020) PERB Decision No. 2745-M, pp. 17-18.) The Board found that while there is no PERB precedent specific to practice privileges, the *County of Sacramento* standard applies equally to practice privileges because the two topics are closely related. Even under the *Richmond Firefighters* framework, the Board explained, the County had a decision bargaining duty.

Where external law establishes "immutable provisions" in an area that is otherwise within the scope of representation, matters are negotiable only "to the extent that the external law does not 'set an inflexible standard or [e]nsure immutable provisions.'" (*County of Sacramento* (2020) PERB Decision No. 2745-M, p. 18.) The Board found that the BOS' limited role in changing EMS bylaws does not equate to the existence of an immutable, externally imposed mandate. Because the BOS retained certain discretion (that it could not unreasonably withhold approval), the County was obligated to negotiate to the extent of that discretion.

The Board rejected the County's argument that its BOS is not bound by the MMBA when it operates as the SCVH governing board, reasoning that the BOS is a unitary governing body, and the County owns and operates SCVH.

At a minimum, the Board explained, the County had a duty to continue meeting with SEIU to clarify the extent of any decision bargaining obligation and to bargain effects. The Board elucidated that "where it is unclear whether the employer has a duty to bargain, it must meet with the exclusive representative in good faith to clarify the extent to which all or part of its contemplated change is subject to bargaining."

Additionally, the Board found that the County violated its effects bargaining duty and declined the County's request to make certain topics off limits in such negotiations. The Board further found that the County's bargaining violations derivatively interfered with protected union and employee rights.

The Board explained that irrespective of whether a decision falls within the scope of representation, if the decision has reasonably foreseeable effects on the terms and conditions of employment, the employer must provide adequate advance notice and opportunity to bargain in good faith over the decision's implementation and effects (e.g., while an employer has no duty to bargain over a decision to lay off employees, the scope of required effects bargaining includes the timing of layoffs and the number and identity of the employees affected).

However, the Board noted that an employer may implement its decision before completing effects negotiations if it can establish that: "(1) the implementation date was based on an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the decision; (2) the employer gave sufficient advance notice of the decision and implementation date to allow for meaningful negotiations prior to implementation; and (3) the employer negotiated in good faith prior to and after implementation."

The Board disagreed with the County's argument that it had no duty to bargain over proposals about investigation or enforcement mechanisms for ascertaining whether an AHP meets practice privilege standards, because responsibility for making changes to such mechanisms lies foremost with EMS and the County cannot make changes without EMS. The Board reasoned that the County's argument ignores both the requirement that an employer bargain to the extent of its discretion and the principle that "a bargaining party can lawfully make a proposal that is contingent on its counterpart attempting in good faith to convince a third party to take a specified action." The Board found no cause to impose artificial limits on the types of proposals SEIU may make pertaining to the effects of changing practice privilege standards, further reasoning that certain changes are impossible absent approval from both EMS and the BOS, which are required to collaborate with one another.

The Board did not void the BOS decision at issue, but rather held employees harmless until good faith bargaining is complete. The Board reasoned that this case involves "unusual

circumstances" as PAs are a small fraction of those covered by the bylaws revisions and the complaint targets only one paragraph of the bylaws.

Additionally, the Board refused to augment customary means of affording employees notice of the decision by ordering the County to provide spoken notice, reasoning that SEIU failed to establish that customary notice mechanisms are insufficient.

SEIU sought, as part of its requested remedies, attorneys' fees based on hours spent successfully litigating the case as well as bargaining and representation damages related to the County's violation. The Board rejected SEIU's argument that PERB should, as a matter of course, order reimbursement of litigation expenses to a successful charging party in a PERB proceeding. Because the Board found that the record failed to indicate that the County asserted a frivolous, bad faith defense, it rejected SEIU's attorneys' fees claims.

The Board noted that while "bargaining or representation damages may include fees based on consulting with an attorney, and/or an attorney's appearance at the bargaining table or in another representational context," "such damages normally do not include fees for any stage of researching or drafting the charge at issue, nor work on later stages of the case [citation omitted], except in unusual circumstances not at issue here [citation omitted]."

The Board found that the following categories are compensable to the extent SEIU can establish that the bylaw revision materially increased such costs in a manner that is reasonably feasible to estimate: (1) compensation to PAs for all costs associated with licensing and testing, including training and testing; and (2) transportation costs, internet expenses, cell phone expenses, and other related expenses. Lastly, the Board found that compensation for bargaining and representation costs that increased, or which SEIU wasted or diverted, because of the County's violation, are compensable if they are reasonably feasible to estimate.

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Registered Nurses Professional Association and Service Employees International Union Local 521 v. County of Santa Clara (2023) PERB Decision No. 2876-M (October 17, 2023), judicial appeal pending

The Registered Nurses Professional Association (RNPA) and Service Employees International Union Local 521 (SEIU) (collectively, Unions) filed an unfair practice charge against the County of Santa Clara (County) alleging that the County violated the MMBA when it: (1) changed terms and conditions of employment, implemented new policies, and applied or enforced existing policies in a new way, while failing to bargain in good faith with the Unions over decisions – regarding emergency measures in response to the COVID-19 pandemic – and/or their negotiable effects; (2) failed to respond to requests for information; and (3) bypassed the Unions by dealing directly with bargaining unit employees.

The County argued that the pandemic suspended its duty to afford the Unions notice and an opportunity to bargain regarding emergency measures.

The Board concluded that: (1) the County could take necessary measures to save lives without first reaching an impasse or agreement with the Unions, but it nonetheless had a duty to provide notice and an opportunity to bargain in good faith to the extent practicable in the particular circumstances; and (2) the County failed to comply with this duty. Neither party challenged the ALJ's proposed order requiring the County to supply the Unions with information they requested, and thus the Board expressed no opinion on it. The Board did not resolve the Unions' exception regarding direct dealing, "as resolving that claim would not impact our order even were we to sustain the exception."

The Board explained that while MMBA section 3504.5 (concerning cases of emergency) explicitly applies only to changes that an employer's governing board makes by adopting an "ordinance, rule, resolution, or regulation" – and that here, the County's Board of Supervisors did not enact any changes at issue but rather County managers did – "[t]his is of no moment, however, because under all PERB-administered statutes, a non-statutory business necessity

defense is available for any emergency measure an employer must take, no matter how accomplished."

The same test applies, the Board elucidated, "irrespective of whether an employer asserts the MMBA's statutory emergency defense, the non-statutory business necessity test, or both: An employer first must establish: (1) an actual emergency that (2) leaves no real alternative to the emergency measure(s) taken and (3) allows no time for meaningful negotiations before taking such action(s)." The fact that the defense applies, however, "does not completely absolve the employer of its duty to afford a union with notice and the opportunity to bargain; rather, the employer must afford the union these rights 'to the extent that the situation permits, although an impasse is not necessary.'" (citing *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1032.) Thus, "an employer facing a true emergency can take emergency measures without first reaching agreement or impasse, but the duty to afford notice and to bargain in good faith continues as much as is practicable, both before and after the employer implements emergency measures."

The Board further explained that "because an emergency is not a static event, changes taken in good faith reliance on a necessity defense must be limited to the timeframe that the emergency requires," and thus "when the emergency lapses, the employer has a duty to honor a union's request to rescind emergency measures the employer implemented without completing negotiations."

The County violated the MMBA, the Board found, by wrongly asserting, throughout the relevant timeframe, that it had no duty to engage in good faith to the extent practicable in the particular circumstances. The Board explained that other California public entities found it possible to bargain and reach agreements during the early months of the pandemic and the record fails to establish adequate reasons why the County was any different.

While the County met with the Unions several times during the pandemic's early weeks, it refused to engage in negotiations and instead characterized the meetings as an opportunity for

the Unions to "voice concerns and suggestions." "[A] party cannot satisfy its duty to bargain by denying it has such a duty while agreeing to meet as a courtesy," the Board explained.

Because the County flatly denied its obligation to bargain, the Board reasoned the case therefore "does not turn on more nuanced determinations as to how early it was practicable to give notice of the emergency measures at issue." Nonetheless, the Board explained:

> [T]he record shows no reason why the County could not have generally provided the Unions notice when the County was still considering these measures. In some instances, this would have allowed negotiations to begin before a decision was finalized. Even when that was not possible, it would typically have allowed at least a preliminary bargaining session (if not more) before employees were notified. And even had the parties been unable to reach agreements, earlier notice would have made it clear the County was doing all it could to bargain, leading to more harmonious labor relations in a difficult period.