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MCLE Self-Study

Social Security Administration No-Match Letters and Collective Bargaining Agreements

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BACKGROUND

Employers are required to file annual reports to the Social Security Administration (SSA) and to the Internal Revenue Service (IRS) through the Wage and Tax Statement (W-2). The information on the W-2 provides the IRS information of earnings paid to employees and amount of taxes deducted, and provides SSA with the amount of employees' earnings and deductions made for purposes of future Social Security benefits. After W-2 statements are submitted, SSA matches the name and Social Security Number (SSN) with an individual's master earnings account. When the SSA cannot post the information to an employee's master earnings record, a mismatch is triggered and the earnings instead are posted to the "earnings suspense file." SSA then issues a "no-match letter" to inform workers their earnings are not being properly credited.

The stated purpose of the SSA no-match letter is to notify workers and their employers of the discrepancy so that employees become aware they are not receiving proper credit for their earnings, which can affect future retirement or disability benefits administered by SSA. According to SSA, there are many reasons for a mismatch. The most common are typographical errors, misspellings of names, transposed numbers, compound last names, and name changes.

While there are many reasons for the discrepancies, the no-match letters themselves do not prove any wrongdoing by either the employer or employee. Confusion and misuse of these SSA letters have an adverse impact on low-wage workers nationwide. Employers often mistakenly assume this discrepancy means the employee is not authorized to work in the United States despite SSA's warning to employers that the no-match letter is not a statement about an employee's immigration status. Often employers misuse the SSA no-match letters to terminate employees or lay off workers without pay. The letters have also been used to undermine union organizing activity at worksites or to retaliate against workers that have complained or have filed wage claims with local agencies. Most recently, some employers have used the SSA mismatch to fire long-term workers only to replace them with new hires at a much lower salary.

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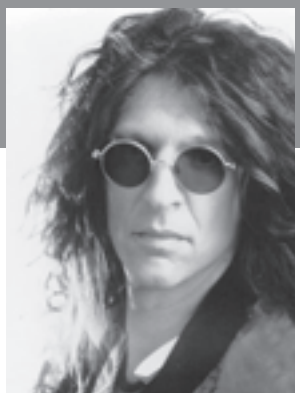
Howard Stern's Lessons for Lame Duck Employees

By Robert S. Nelson, Esq.



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Howard Stern clearly has a gift for getting under radio executives' skin. According to his 1997 movie *Private Parts*, he once exasperated NBC executive producer Kenny "Pig Vomit" Rushton so much that Rushton tried to club him with a Peabody award. Now, Howard is being sued for $200 million by CBS Radio, his longtime employer. The suit, filed on February 28, 2006 in New York, is widely regarded as a vendetta by CBS Chairman Les Moonves against Stern. The suit claims that Howard breached various contractual and fiduciary responsibilities and misappropriated CBS resources (namely, its air time) during the time that he was a "lame duck" CBS employee. Vendetta or not, the lawsuit should serve as a cautionary tale to employers of the do's, don'ts, and potential pitfalls of lame duck employment relationships.

LAME DUCK BASICS

Lame duck employment relationships are those in which the employer and/or the employee have expressed a desire to definitively end the relationship but, for whatever reason, the relationship continues beyond the time of notification. The paradigm lame duck scenario occurs when an employee informs his/her employer that he/she plans to move on, and the employee and employer then mutually decide on a date when the employee will officially leave work. Between the time of notification and departure (i.e., the "lame duck" period), the employee primarily works to finish any remaining projects he/she has outstanding, and/or to assist in transitioning his/her job to a replacement. Lame duck relationships are distinguishable by the fact that employees continue working during the lame duck time.[1]

HOWARD STERN: KING OF ALL MEDIA, LAME DUCK

In October 2004, Howard Stern formally announced that he intended to leave traditional, terrestrial radio to move to subscription satellite radio. At the time, he was still subject to a long-term contract with CBS, which syndicated Howard's "shock jock" radio broadcasts across the country.[2] Although the contract was not scheduled to expire until the end of 2005, Howard went ahead and signed a blockbuster, $500 million deal with his new employer, Sirius Satellite Radio, prior to making his October 2004 announcement. Sirius was unwilling to buy out the remainder of Howard's CBS contract, so CBS faced a choice: either let Howard remain on the air through some or all of his remaining contract, or take him off immediately. CBS chose to let Howard keep broadcasting until December 2005, when the contract expired. Howard was therefore a lame duck employee for roughly 14 months, from October 2004 until December 2005.

There were admittedly important differences between Howard, the self-proclaimed "King of all Media," and the typical lame duck. For one thing, Howard was subject to a contract for a specified duration of time, rather than being employed at-will. Also, Howard has significantly more clout, bargaining power, and influence over his employer's business than does the typical lame duck employee. But there were also a surprising number of similarities between Howard Stern's lame duck time and the lame duck relationships of rank-and-file employees, including the fact that Howard's antics sparked a lawsuit by his former employer. Too often, lame duck relationships end in contract, trade secret, and/or breach of loyalty disputes. Ironically, Howard Stern can now provide useful lessons how to avoid such problems.

HOWARD'S LAME DUCK LESSONS

Lesson #1: Treat lame duck employees like exes

The first lesson that Howard's lame duck time illustrates is that employment relationships should be treated the same as romantic relationships when they are coming to an end; the faster employers and employees end irreparable relationships and move on with their respective lives, the better it usually is for all involved.

In the weeks and months immediately after he announced his plans to move to satellite radio, Howard and his handlers at CBS, most notably Moonves; Tom Chiusano, general manager of K-ROCK radio (the CBS' flagship from which Howard broadcast); and Joel Hollander, President and CEO of CBS Radio, were unfailingly gracious and polite to one another. Howard asserted repeatedly that he would not use his on-air time to blatantly undermine CBS; CBS, in turn, allowed Howard to engage in a reasonable amount of Sirius discussion as part of his morning schtick (much of which, after all, involves Howard discussing his life events). But the longer the lame duck

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Rethinking Individual Liability and "Adverse Employment Actions" After *Yanowitz v. Loreal, Inc.*

By Ronald W. Novotny

Editor's Note: In September 2005, we published "Reassessing Individual Liability for Retaliation Under FEHA in Light of McClung v. Employment Development Department" by Michael S. Kalt. Mr. Novotny revisits this topic in light of Yanowitz v. L'Oreal, Inc., which the California Supreme Court decided after Mr. Kalt's article had been finalized for publication.

Counsel representing management in employment matters have found much to criticize in last year's decision by the state Supreme Court in *Yanowitz v. L'Oreal USA, Inc.*,[1] from the Court's purported requirement that employers be almost telepathic in knowing of a discrimination complaint to the kinds of employment actions that can form the basis for a retaliation claim under the Fair Employment and Housing Act (FEHA). It is popular wisdom that the *Yanowitz* case was therefore a positive development for plaintiffs suing under the statute, and that its treatment of those issues may pose obstacles to obtaining summary judgment on retaliation claims. But the Court's reasoning in that case can actually be used to argue one of the most difficult issues these cases pose to employers: obtaining the dismissal of individual defendants from retaliation claims.

Even before *Yanowitz*, three courts uniformly defined the elements of a retaliation claim under FEHA as requiring some of employment action that is taken by an employer, as opposed to another employee. In *Yanowitz*, the Court held that in order to establish a *prima facie* case of retaliation under FEHA, the plaintiff must show that (1) he or she engaged in a "protected activity," (2) the *employer* subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the *employer's* action.[2] The Court went on to state that once an employee establishes a *prima facie* case,

> the *employer* is required to offer a legitimate non-retaliatory reason for the adverse employment action [citation omitted] . . . if the *employer* produces a legitimate reason for the adverse employment action, the presumption of retaliation "drops out of the picture, and the burden shifts back to the employee to prove intentional retaliation."[3]

As such, the *Yanowitz* decision provides an additional argument for exempting all employees from personal liability for retaliation.[4]

In *Yanowitz*, the Supreme Court additionally clarified the type of conduct required to establish an "adverse employment action" upon which a retaliation claim can be based. The Court specifically addressed the question of whether the "or otherwise discriminate" language in Cal. Gov't Code § 12940(h) should be interpreted to refer to the same category of adverse employment measures or sanctions that are covered by § 12940(a)—which prohibits discrimination in the "terms, conditions or privileges of employment"—or a broader range of adverse employment actions that are "reasonably likely to deter employees from engaging in protected activities."[5] After reviewing the two statutory subsections together, the court concluded that the Legislature more likely intended to extend a comparable degree of protection to employees who were subject to unlawful discrimination and those who were retaliated against for opposing such discrimination, *"rather than to interpret the statutory schemes as affording a greater degree of protection against improper retaliation than is afforded against direct discrimination."*[6] The Court then stated:

> Accordingly, we conclude that the terms "otherwise discriminate" in section 12940(h) should be interpreted to refer to and encompass the same forms of adverse employment activity that are actionable under section 12940(a).[7]

Several years ago, the Court conclusively held that individual employees cannot be held liable under FEHA for those discriminatory acts which violate section 12940(a). In *Reno v. Baird*,[8] the Court reviewed at length and approved the Court of Appeals' decision in *Janken v. GM Hughes Electronics*,[9] which concluded that "commonly necessary personnel management actions" such as "hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or non-assignment of supervisory functions, deciding who will and will not attend meetings, deciding who will be laid off, and the like" may not subject supervisors to personal liability under FEHA, even if they are alleged to be discriminatory in nature. The *Reno* court adopted this reasoning in holding that "Individuals who do not themselves qualify as employers may not be sued under the FEHA for alleged discriminatory acts."[10] Accordingly, if the factual allegations presented are within the realm of "properly-delegated personnel management authority," individual supervisors cannot be personally liable for such conduct, and a claim of discrimination based

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Supreme Court Upholds SPB's Exclusive Jurisdiction Over State Civil Service Disciplinary Actions

By Dorothy Bacskai Egel and Elise S. Rose

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On December 1, 2005, for the second time in six months, the California Supreme Court resolved a conflict between the constitutional state civil service system and the statutory collective rights of state employees. Together, these decisions confirm that attempts to regulate the hiring and the termination of state civil service employees through collective bargaining and implementing legislation cannot override the constitutional merit principles set forth in Cal. Const., art. VII, nor bypass the exclusive constitutional authority of the State Personnel Board to oversee the state civil service to ensure protection of the merit principle. Previously, in *State Personnel Board v. California State Employees Association (SPB v. CSEA)*,[1] the Court held that a collectively bargained "post and bid" process that allowed state employees to be appointed or promoted within the civil service based upon seniority violated the constitutional mandate that appointments and promotions be based upon merit. A few months later, in *State Personnel Board v. Department of Personnel Administration (SPB v. DPA)*,[2] the Court held that the provisions of a legislatively-approved collective bargaining agreement could not bypass the SPB's constitutionally mandated review of disciplinary actions by establishing a binding grievance and arbitration process that removed the review of disciplinary actions from the SPB.

BACKGROUND: THE SPB'S CONSTITUTIONAL AUTHORITY[3]

In 1913, California enacted its first Civil Service Act. The goal of the Act was to establish a professional, well-qualified cadre of civil servants to perform the work of the state government. By the early 1930s, the civil service was largely viewed as corrupt and a political tool of then-Governor Hiram Johnson and the Legislature. The Governor and members of the Legislature, as well as the statutory personnel board itself, made so many politically-motivated appointments and exemptions to the civil service that, by 1932, fully one-half of the state workforce was exempt from the civil service laws.

To address these deficiencies, in 1934, the voters adopted a constitutional initiative that established the State Personnel Board (SPB) as an independent constitutional agency. The constitutional amendment established the principle that appointments and promotions in the civil service were to be made solely on the basis of "merit" ascertained by competitive examination.[4] It also specified that certain duties were not to be performed by anyone but the SPB itself: enforcing the civil service statutes, prescribing probationary periods and classifications, adopting other rules authorized by statute, and *reviewing disciplinary actions*.[5]

Charged with this constitutional mandate, the SPB has, for over 70 years, administered a system for reviewing disciplinary actions taken against state civil service employees. Once a state employer, known as an "appointing power," imposes disciplinary action on an employee, the employee is entitled to appeal the action to the SPB and obtain an evidentiary hearing before an administrative law judge (ALJ) employed by the SPB as its authorized representative.[6] The burden of proof is on the employer to establish, by a preponderance of the evidence, that the employee engaged in the charged misconduct and that the penalty imposed is just and proper under all the circumstances.[7] After hearing, the ALJ prepares a proposed decision, but the five-member SPB itself makes the final decision to sustain, modify or revoke the adverse action imposed by the appointing power.[8] If the employer and employee settle their dispute, they may submit a stipulation of settlement for review and approval by SPB that, if approved, becomes final and binding on the parties.[9]

Decisions of the SPB are subject to judicial review by writ of administrative mandate,[10] and the courts must defer to the SPB's factual findings if they are supported by substantial evidence.[11] If the employee accepts the discipline and fails to appeal, the disciplinary action imposed by the employer becomes final.[12]

THE CHALLENGED GRIEVANCE AND ARBITRATION PROCESS

Beginning in 1998, the State of California, through the Department of Personnel Administration (DPA) acting as the Governor's collective bargaining representative, entered into memoranda of understanding (MOUs) with state employee bargaining representatives for Bargaining Units 8, 11, 12 and 13 that dramatically altered the process for reviewing state employee discipline. Under the negotiated procedures, covered employees could challenge disciplinary actions either by seeking review before the SPB or by submitting the disputed disciplinary action to grievance and arbi-

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Unilateral Implementation of Terms and Conditions of Employment: Public Employers' Rights and Limitations

By Bruce A. Barsook*

Normally, changes in terms and conditions of employment (e.g., wages, benefits, hours, leaves) are the result of negotiated agreements between the public employer and the recognized employee organization. Occasionally, however, employers determine that they need to change those working conditions without agreement. This can result in disharmony, destabilization, and legal challenges (and/or concerted activity) from the labor organization. While the wisdom of such actions and their impact on labor-management relations are certainly worth considering, time and space limitations require that this article limit its focus to the conditions under which such unilateral actions are legally permissible.

GENERAL RULE—UNILATERAL ACTIONS PROHIBITED

It is a fundamental tenet of labor law that an employer must refrain from taking any unilateral action that would change a mandatory subject of bargaining until it has given the recognized employee organization notice and an adequate opportunity to bargain, and if bargaining is requested, until the parties have either reached an agreement or reached impasse and have exhausted any mandatory impasse resolution procedures.[1] Absent some legally recognized defense, failure of an employer to comply with these obligations constitutes, in and of itself, a "per se" violation of the duty to negotiate in good faith.[2]

EXCEPTIONS TO THE GENERAL RULE

There are four legally recognized defenses to employer-initiated unilateral action: 1) waiver; 2) necessity; 3) expiration of the collective bargaining agreement; and 4) impasse. Since the essence of collective bargaining is bilateralism, courts and labor boards construe these exceptions reluctantly and narrowly.[3] PERB has held that the employer not only bears the burden of proving the affirmative defense of waiver, but that any doubts must be resolved against the party asserting waiver.[4]

1. Waiver

An exclusive representative may waive its right to negotiate a proposed change in the terms and conditions of employment by: agreeing to waive its right to bargain during the term of the agreement (contract waiver); or failing to request negotiations despite notice and a reasonable opportunity to negotiate before the implementation of the proposed change.

In order to justify a unilateral action the contract must contain specific language that clearly and unmistakably waives the right to bargain over a change in a particular matter. Such a waiver is most often found when the specific subject is covered by the express terms of an existing agreement.

For example, in one case the Public Employment Relations Board (PERB) held that a provision in a collective bargaining agreement permitting "one duty free lunch period of no less than 30 minutes each day," constituted a clear waiver of the union's right to bargain over a reduction of the teachers' lunch period from 50 to 30 minutes.[5]

On the other hand, general provisions such as "zipper" clauses, which extinguish the employer's duty to bargain during the term of the agreement, generally will not be held to constitute the requisite clear and unmistakable waiver. Such provisions serve only to "shield" the employer from union requests to negotiate during the term of the contract, they do not provide the employer with the "sword" to unilaterally adopt changes in employment terms.[6]

Management rights clauses, which may reserve to management the "exclusive" right to take action with respect to a list of specified employment condition, are generally not considered to be a sufficiently clear and unmistakable waiver allowing unilateral employer action. Thus, it has been held that even though a "county rights" clause in a memorandum of understanding reserved for the county "the exclusive right to . . . assign its employees," the county could not unilaterally change shift assignments because the language did not constitute a "clear and unmistakable relinquishment" of the union's right to bargain.[7]

A public employer may act unilaterally if it offers written notice and a reasonable opportunity to meet before the intended action, and the employee organization fails to request bargaining.[8] Simply protesting an employer's contemplated unilateral action is not the same as a demand to bargain.[9] An employee organization however, need not request bargaining when such a request would be futile or if a firm decision has already been made by the employer.[10] Under such circumstances, a unilateral change would be unlawful.

PERB has also suggested that under some circumstances a union's failure to negotiate in good faith, following the employer's notice and opportunity to negotiate, may constitute a waiver of the union's right to negotiate, and hence authorize an employer's unilateral action.[11]

2. Necessity

While compelling business or operational necessity may sometimes justify unilateral action, courts and labor boards have usually looked with disfavor at these employer claims. In order to justify unilateral action the necessity must be the unavoidable consequence of a sudden change in circumstances beyond the employer's control, there must be no alternative course of action available, and the timing must preclude the opportunity for bargaining.[12]

Alleged financial emergencies have traditionally fared poorly as a ground for

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EMPLOYMENT LAW NOTES

By Anthony J. Oncidi

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Employee With Criminal And Mental Hospitalization Record Was Victim Of Disability Discrimination

Josephs v. Pacific Bell, 432 F.3d 1006 (9th Cir. 2005)

Joshua Liam Josephs, a former Pacific Bell service technician, sued PacBell for mental disability discrimination in violation of the ADA and the California Fair Employment and Housing Act. PacBell hired Josephs after he checked "No" to a question on his employment application asking whether he had ever been convicted of a felony or misdemeanor. PacBell, which is permitted by statute to obtain a detailed criminal history of its employees who have unsupervised access to customers' homes, later discovered that Josephs had been tried for attempted murder (but was found not guilty by reason of insanity) and had been convicted of a misdemeanor battery on a police officer. PacBell also learned that Josephs had been committed to and had spent 2½ years in a California state mental hospital and six months in a board-and-care mental health facility. Shortly after learning this information, PacBell suspended Josephs and then terminated his employment for making fraudulent entries on his employment application. At trial, the jury determined that PacBell's termination of Josephs was nondiscriminatory, but that the company's refusal to reinstate him after he grieved the termination through the union was unlawful because PacBell regarded him as mentally disabled in violation of the ADA. The Ninth Circuit affirmed the judgment in favor of Josephs on the ground that "the evidence simply does not compel a conclusion that, in the eyes of PacBell, Josephs was not qualified for the service technician position because of his past violent acts." *Cf. Claudio v. Regents of the Univ. of Cal.*, 134 Cal. App. 4th 224 (2005) (given the "unusual circumstances" of this case, employer should have engaged in the interactive process with disabled employee's attorney rather than the employee himself); *Raine v. City of Burbank*, 135 Cal. App. 4th 1215 (2006) (employer was not required to make temporary light-duty job available indefinitely after employee's disability became permanent).

Employer Was Improperly Prohibited From Seeking To Enforce Non-Compete Agreement

Biosense Webster, Inc. v. Superior Court, 135 Cal. App. 4th 827 (2006)

Biosense, a manufacturer and seller of electrophysiology catheters and anatomical mapping devices, had its employees sign non-competition agreements prohibiting them from providing services to "conflicting organizations" for 18 months after leaving Biosense. After three of its former employees went to work for St. Jude Medical, one of its competitors, Biosense threatened St. Jude with litigation for "unlawful raiding" of its employees. In response, St. Jude filed a lawsuit against Biosense for declaratory relief and unfair competition under Cal. Bus. & Prof. Code §§ 16600 and 17200 and sought a temporary restraining order (TRO) and order to show cause (OSC) re preliminary injunction. The trial court granted the TRO enjoining Biosense from commencing any action other than in the Superior Court of the State of California to enforce any non-competition agreement with the three former employees and issued the OSC re preliminary injunction. However, the Court of Appeal granted Biosense's petition for writ of mandate and concluded that the trial court erred in granting the TRO prohibiting Biosense from commencing an action in a sister state (based on *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697 (2002)) or in federal court.

Employees Who Were Transferred From One Employer To Another Were Not "Laid Off" Under Cal-WARN Act

MacIsaac v. Waste Mgmt. Collection & Recycling, Inc., 134 Cal. App. 4th 1076 (2005)

North Bay Disposal Corporation purchased from Empire Waste Management a contract to provide waste disposal services to the City of Santa Rosa. As part of the agreement, Empire Waste transferred to North Bay one mechanic and 41 garbage truck drivers who would drive the same routes for the City, use the same equipment and work the same schedule for the same pay, benefits and seniority rights. After Stanley MacIsaac was laid off (along with 19 other employees) by Empire Waste, he filed a class action lawsuit, claiming the company had violated the California WARN Act by failing to provide him and other similarly situated employees 60 days' notice of a "layoff." In its motion for summary judgment, Empire Waste asserted that there had been no "mass layoff" because it had laid off only 20 employees, and the statute applies only to layoffs of 50 or more employees. MacIsaac argued that the 20 laid off Empire Waste employees should be added to the 42 employees who had been transferred to North Bay Disposal for a total of 62 employees affected by the "layoff." The Court of Appeal affirmed summary judgment in favor of Empire Waste, holding that the 42 transferred employees were not part of a "lay off" within the meaning of the California WARN Act because they continued to perform the same work at the same rates of pay and for the same benefits following the transfer.

Nurse Could Not Amend Her Complaint To Add Class Action Claims

Figueroa v. Northridge Hosp. Med. Ctr., 134 Cal. App. 4th 10 (2005)

One year after she filed suit against Northridge Hospital for discrimination and failure to accommodate her pregnancy, among other things, Raquel Figueroa requested leave to file an amended complaint to include class action claims for failure to pay wages and unfair business practices on behalf of all current and

former nurses and other non-exempt employees. The trial court denied Figueroa's motion to amend on the grounds that she had unreasonably delayed and that defendants would be prejudiced because they already had engaged in costly discovery proceedings and two costly private mediations. The Court of Appeal held that the denial of a motion to amend is not an appealable order and dismissed Figueroa's appeal. (The Court noted that Figueroa could have sought timely review of the trial court's order by filing a writ petition, which she had failed to do.) *Cf. Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985 (9th Cir. 2005) (employee's later-filed FLSA and FMLA claims were barred by the *res judicata* doctrine); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140 (9th Cir. 2006) (appeal from denial of motion to remand class action under Class Action Fairness Act of 2005 was timely filed).

Employer's Claims Against Former Employee Were Properly Dismissed

Greka Integrated, Inc. v. Lowrey, 133 Cal. App. 4th 1572 (2005)

Greka Integrated sued its former safety manager, Gary Lowrey, for breach of a non-disclosure agreement and conversion associated with Lowrey's taking emails and other documents that belonged to the company and for disclosing those documents to third parties, including Greka's competitors. Lowrey contended that he discovered many violations of worker safety and environmental regulations while he was employed at Greka and that the company refused to correct these conditions, which caused Lowrey to experience debilitating stress. The trial court granted Lowrey's anti-SLAPP motion to strike Greka's complaint. The Court of Appeal affirmed dismissal of Greka's lawsuit on the ground that Lowrey had met his burden of showing that the complaint arose from protected speech (deposition and trial testimony in response to subpoenas) and that Greka had little probability of success on the merits. Additionally, the Court ordered that Lowrey recover his costs and attorney's fees on appeal. *Cf. Olaes v. Nationwide Mut. Ins. Co.*, 135 Cal. App. 4th 1501 (2006) (employee's defamation claim against former employer arising from investigation into his alleged sexual harassment of co-workers was not subject to dismissal under anti-SLAPP statute); *City of Los Angeles v. Animal Defense League*, 135 Cal. App. 4th 606 (2006) (workplace violence protective orders obtained on behalf of two city employees should have been stricken under anti-SLAPP statute).

Manager Was Non-Exempt, And Meal/Rest Break Claims Were Subject To One Year Statute Of Limitations

Murphy v. Kenneth Cole Productions, Inc., 134 Cal. App. 4th 728 (2005)

Former store manager John Paul Murphy sued Kenneth Cole Productions, Inc. (KCP), a small, upscale retail clothing store, for violations of the wage and hour law, asserting that he was improperly classified as an exempt employee. After resigning his employment, Murphy filed a complaint with the Labor Commissioner. The Labor Commissioner awarded Murphy $26,667.22 in unpaid overtime, $2,863.99 in interest and a waiting time penalty of $7,177.50 ($239.25 x 30 days). After KCP appealed, Murphy (by then represented by the Hastings College of the Law Civil Justice Clinic) filed a "notice of claims," adding claims for unpaid meal and rest periods, pay-stub violations and interest and attorney's fees. The trial court awarded Murphy unpaid overtime ($28,412.56), payments for missed meal and rest periods ($17,431.77) and pay stub violations ($1,650), waiting time penalties ($7,895.40) and prejudgment interest plus attorney's fees in the amount of $62,171.40. The Court of Appeal affirmed the lower court's judgment that Murphy was a non-exempt employee (and, thus, entitled to overtime) in that he spent "far less than half of his time engaged in managerial duties." However, the Court reversed the judgment to the extent it included an award for missed meal and rest periods and for pay-stub violations because such claims had not been raised before the Labor Commissioner. Further, the Court held that the payment for a meal/rest period violation is a penalty not a wage and, therefore, is subject to a one-year statute of limitations. *Accord Mills v. Superior Court*, 135 Cal. App. 4th 1547 (2006); *compare National Steel & Bldg. Co. v. Superior Court*, 135 Cal. App. 4th 1072 (2006) (wage); *Tomlinson v. Indymac Bank*, F.S.B., 359 F. Supp. 2d 891 (C.D. Cal. 2005) (wage).

Claims For Civil Penalties Under Private Attorneys General Act Were Properly Dismissed

Caliber Bodyworks, Inc. v. Superior Court, 134 Cal. App. 4th 365 (2005)

Four former employees of Caliber Bodyworks filed a complaint for various wage-and-hour violations on behalf of themselves and as class representatives and for civil penalties for these violations. Caliber demurred to the entire complaint on the ground that plaintiffs had failed to allege they had satisfied the administrative prerequisites of the Labor Code Private Attorneys General Act of 2004 (PAGA), Labor Code § 2698, *et seq.* After the trial court overruled its demurrer, Caliber filed a petition for writ of mandate. The Court of Appeal granted the petition in part, holding that plaintiffs' claims for civil penalties arose, if at all, under PAGA, meaning that plaintiffs were required to plead compliance with the Act's pre-filing notice and exhaustion requirements. However, the Court left undisturbed the trial court's order denying dismissal of the other parts of the complaint.

Injuries Employee Sustained While Touring Italy Were Not Covered By Workers' Compensation

Fleetwood Enterprises, Inc. v. WCAB, 134 Cal. App. 4th 1316 (2005)

After completing the business portion of a trip to Europe, John Moody extended his stay for additional sightseeing with his wife in Italy. Moody sought workers' compensation coverage for severe injuries that he suffered in an automobile accident in which he was involved while driving from Rome to Düsseldorf. The workers' compensation judge determined that Moody, a design manager for Fleetwood (an RV manufacturer), had driven to Rome after completing the business portion of the trip in part to observe RV designs and elements that he happened to see on the road. The Court of Appeal reversed, holding that "there is *no* evidence that Fleetwood expected or required [Moody] to continue photographing RV's in between admiring Michelangelo's David and the Coliseum…. A unilateral, sporadic consideration of the employer's business, at times and locations that cannot be regulated or supervised by the employer, does not expand the course of employment." *See also City of Stockton v.*

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Cases Pending Before the California Supreme Court

By Phyllis W. Cheng

Phyllis W. Cheng is a member of the Labor and Employment Law Section's Executive Committee, co-editor-in-chief of this law review, and a senior appellate court attorney at the Court of Appeal, Second Appellate District, Division Seven.

Adams v. Los Angeles Unified School District, decision without published opinion, *review granted*, 2004 Cal. LEXIS 11343 (2004). S127961/B159310. Petition for review after affirmance of judgment. Holding for *Carter v. Department of Veterans Affairs, infra.*

Atwater Elem. School District v. Dept. of General Services, 116 Cal. App. 4th 844 (2004), *review granted*, 13 Cal.Rptr.3d 534 (2004). S124188/F043009. Petition for review after the reversal in judgment in action for writ of administrative mandate. Can a school district ever suspend or dismiss a credentialed teacher based on matters occurring more than four years before issuance of the notice of intention to impose such discipline (for example, under an equitable tolling or delayed discovery theory), or does Cal. Ed. Code § 44944(a) absolutely ban reliance on such evidence? (Cf. Cal. Ed. Code § 44242.7(a).)

Carter v. Department of Veterans Affairs, 121 Cal. App. 4th 840 (2004), *review granted*, 21 Cal. Rptr. 3d 609 (2004). S127921/E030908. Petition for review after reversal of judgment. (1) Prior to its amendment by Statutes 2003, chapter 671, did the Fair Employment and Housing Act (Cal. Gov't Code § 12900 et seq.) impose a duty on an employer to take reasonable steps to prevent hostile environment sexual harassment of an employee by a client with whom the employee is required to interact? (2) If not, did the Legislature intend the 2003 amendment to apply retroactively to incidents that occurred prior to the effective date of the amendment? (3) If so, would application of the 2003 amendment to such cases violate the due process clause of the state or federal Constitution?

Claremont Police Officers Association v. City of Claremont, 112 Cal. App. 4th 639 (2003), *review granted*, 8 Cal. Rptr. 3d 541 (2004). S120546/B163219. Petition for review after judgment reversing denial of petition for writ of mandate. (1) Under what circumstances, if any, does a public agency's duty under the Meyers-Milias-Brown Act (Cal. Gov't Code § 3500 et seq.) to meet and confer with a recognized employee organization before making changes to working conditions apply to actions implementing a fundamental management or policy decision where the adoption of that decision was exempt under Cal. Gov't Code § 3504? (2) In particular, did the city have a duty to meet and confer before implementing the Vehicle Stop Data Policy at issue in this case?

Cohen v. Health Net, 129 Cal. App. 4th 841 (2005), *review granted*, 34 Cal. Rptr. 3d 190 (2005). S135104/G033868. Petition for review after affirmance of judgment. Further action in this matter is deferred pending consideration and disposition of a related issue in *Branick v. Downey Savings and Loan*, S132433 and *Californians for Disability Rights v. Mervyn's*, S131798 (see Cal. Rules of Court, rule 28.2(d)(2)), or pending further order of the court.

Dore v. Arnold Worldwide, Inc., decision without published opinion, *review granted*, 2004 Cal. LEXIS 6634 (2004). S124494/B162235. Petition for review after reversal of judgment. Is an employment contract that states that "your employment with [the employer] is at will" but also states that "[t]his simply means that [the employer] has the right to terminate your employment at any time" reasonably susceptible of the interpretation either that employment may be terminated at any time without cause or that employment may be terminated at any time but only with cause, permitting the introduction of extrinsic evidence on the issue of the proper interpretation of the contract?

Gattuso v. Harte-Hanks, 133 Cal. App. 4th 985 (2005), *review granted*, 2006 Cal. LEXIS 2545 (2006). S139555/B172647. Petition for review after affirmance of order denying class certification. May an employer comply with its duty under Cal. Lab. Code § 2802 to indemnify its employees for expenses they necessarily incur in the discharge of their duties by paying the employees increased wages or commissions instead of reimbursing them for their actual expenses?

Green v. State of California, 132 Cal. App. 4th 97 (2005), *review granted*, 2005 Cal. LEXIS 12602 (2005). S137770/E034568. Petition for review after affirmance in part and reversal in part of judgment. In order to establish a prima facie case under the Fair Employment and Housing Act (Cal. Gov't Code § 12900 et seq.) for discrimination in employment based on disability, does the plaintiff bear the burden of proving that he or she is capable of performing the essential duties of the job or does the employer have the burden of proving that the plaintiff was not capable of performing those duties? Holding for lead case in *Flatley v. Mauro*, S128429.

Harron v. Bonilla, 125 Cal. App. 4th 738 (2005), *review granted*, 2005 Cal. LEXIS 4585 (2005). S131552/D042903. Petition for review after affirmance of judgment. The court ordered briefing deferred pending decision in *Flatley v. Mauro*, S128429, which presents the following issue: When a plaintiff files a cause of

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NLRB Update

By Alan Berkowitz and Daniel Feldstein

Alan Berkowitz is a partner and Dan Feldstein is an associate in the Labor and Employment Law Department of Bingham McCutchen, LLP in the firm's San Francisco office.

Emma Leheny's NLRA Case Notes in the January 2006 issue inadvertently included an editorial comment that was not hers and should not have been a part of her column. The managing editor apologizes for the mistake.

Decision That California Law Requiring Neutrality From Government Contractors is Preempted By The NLRA Will Be Reconsidered En Banc.

Chamber of Commerce of the U.S. v. Lockyer, Nos. 03-44166, 03-55169, 435 F.3d 999 (9th Cir. 200) (granting en banc review).

In our November 2005 issue we reported that the Ninth Circuit Court of Appeals ruled 2-1 that California Gov't Code §16645 et al., was preempted by the National Labor Relations Act. This decision has recently been withdrawn after a majority of the 9th Circuit acting judges ordered an en banc re-hearing.

This case involves a 2001 California law sponsored by organized labor which requires companies receiving state funds to remain neutral in the face of union organizing. In a detailed decision reviewing federal preemption and the policies and purposes of the NLRA, the Ninth Circuit initially ruled that the statute was preempted by the NLRA. The AFL-CIO and the California Attorney General unsuccessfully argued that the law was content neutral in that it prohibited all employer sponsored speech whether for or against a union, and, in any event, was a valid exercise of the State's spending powers. Both arguments were rejected.

The majority previously determined that the statute was anything but neutral. This was apparent because the statute "exempts certain pro-union activities" from the statute including allowing employers to spend money to carry out a "voluntary recognition agreement" with a union. Moreover, the statute's lip-service to prohibiting union assistance was hollow at best. It is "[r]are indeed . . . where an employer will actually dedicate resources to encourage its employees to unionize." The undeniable purpose of Cal. Gov't Code § 16645 was therefore to "prevent the expenditure of money which seeks to deter union organizing." This purpose runs contrary to Section 8(c) of the NLRA which "permits employers to articulate, in a non-coercive manner, their views regarding union organizing efforts" and "manifests a congressional intent to encourage free debate on issues dividing labor and management."

The Ninth Circuit turned next to NLRA preemption doctrines and determined that the statute was preempted because it "stifles employers' speech rights which are granted by federal law" and "runs roughshod over the delicate balance between labor unions and employers" in their communications to employees. The majority paid little attention to the AFL-CIO and the Attorney General's argument that the statute was not preempted "because the state's spending power is invoked as the tool for the state's regulation." The court observed that accepting such an argument would "elevate the statute's use of state funds to talismanic status, as if the employment of state funds forgives the statute's interference with the" NLRA.

General Statements About Job Performance And Favoritism Are Not Protected Concerted Activity If Employee Does Not State His Concerns Are Shared By Other Employees.

Tampa Tribune, 346 NLRB No. 38 (January 31, 2006).

In a 2-1 decision, the NLRB revisited its standards for determining whether a single employee's complaint is protected concerted activity. While no bright lines were delineated, *Tampa Tribune* applies a general rule that an employee's complaints about his/her treatment are not likely to be protected unless the complaining employee affirmatively states that s/he is raising concerns shared by others.

In 2003, Tampa Tribune implemented a "union free" campaign encouraging its employees to abandon the Union. Banos was a bargaining unit employee and was the Union's primary representative with management for 13 years. After spearheading the Union's handbilling campaign, Banos arrived for his scheduled shift. As part of his responsibilities, Banos shut-down the press line to make necessary repairs. According to the employer, a back-up press line should have been activated to prevent any operational interruptions. No back-up machinery was used and Banos' repairs disrupted company operations for 10-minutes. Banos was subsequently called into his supervisor's office When it became clear that the meeting involved possible disciplinary action, Banos requested the presence of a Union Steward. Banos' supervisor proceeded to criticize his performance. Banos defended his conduct, stating that if his supervisor's brother-in-law had done the same thing she would be "kiss[ing his] ass." A week later Banos was disciplined for his conduct during the "coaching" session.

The General Counsel argued that Banos' discipline was improper because it was based on: (1) union activity; and/or (2) protected concerted activity. A majority of the Board disagreed with both contentions, reversed the Administrative Law Judge, and dismissed the complaint. Critical to its analysis, the majority determined that Banos was in his supervisor's office "as an employee and not in his representative capacity as a union steward." According to the Board, the fact that Banos admitted nobody uttered the word "union" during his disciplinary meeting demonstrates he was acting solely on his own behalf. Furthermore, the fact that Banos' raised complaints of favoritism in

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Public Sector Case Notes

By Jill Babbington

Jill Babington, an associate in Liebert Cassidy Whitmore's Los Angeles office, is experienced in the defense of public entities in all aspects of employment litigation, including discrimination and harassment claims, civil rights, first and fourth amendment, and privacy claims. Liebert Cassidy Whitmore has offices in Los Angeles and San Francisco.

SEXUAL HARASSMENT

Ninth Circuit Holds That Supervisor's Bullying Conduct May Be Basis For Sexual Harassment And Discrimination Suit Even If It Is Not Sexually Charged.

Equal Employment Opportunity Commission v. National Education Association, Alaska, 422 F.3d 840 (9th Cir. 2005)

Carol Christopher, Julie Bhend and Carmela Chamara were employed by the National Education Association-Alaska (NEA) and worked under its executive director, Thomas Harvey. The women alleged that Harvey would yell at them loudly and publicly for no reason and stand behind them while they worked. In addition, Harvey was physically aggressive and frequently used aggressive gestures to make a point such as shaking his fist in the women's faces, pumping his fist in their direction, or lunging towards them.

The women filed charges with the EEOC, which then filed an action against the NEA, alleging the organization created a sex-based hostile work environment. The NEA moved for summary judgment, arguing there was no evidence that Harvey's harassment was based on sex. The district court granted summary judgment in favor of the NEA. The Ninth Circuit reversed.

To establish a claim for hostile work environment or sexual harassment, a party need not demonstrate that hostile acts are overtly sexual or gender specific. While sex or gender specific behavior is one way to establish discriminatory harassment, it is not the only way. "A pattern of abuse in the workplace directed at women, whether or not it is motivated by 'lust' or by a desire to drive women out of the organization, can violate [the law]." Here, Harvey's behavior was not sex or gender related. Harvey did not make sexual overtures or lewd comments to the women. Instead, Harvey simply bullied the women. As such, the Ninth Circuit held that an alternative theory for sexual harassment or hostile work environment claims can be where "an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men."

The Court also noted it made no difference that Harvey treated men in the same manner that he treated women because the ultimate issue is whether the conduct affected women more adversely than it affected men. Even if a supervisor uses epithets "equal in intensity and in an equally degrading manner against male employees," the supervisor may still be liable for his conduct toward women because courts look to whether a reasonable *woman* would be offended by the conduct.

GENDER DISCRIMINATION

Ninth Circuit Reverses Summary Judgment In Favor Of Employer Where Female Employee Presented Evidence That Gender Could Have Been A Motivating Factor In The Employer's Decision Not To Promote Her.

Dominguez-Curry v. Nevada Transportation Department, 424 F.3d 1027 (9th Cir. 2005)

Sylvia Dominguez-Curry worked in the contract compliance division of the Nevada Department of Transportation under the supervision of Roc Stacey. Dominguez alleged that Stacey made demeaning comments to women and told sexually explicit jokes in the workplace "like everyday." For instance, after Dominguez began working for Stacey, Stacey told her, "Every woman that comes to work in our division gets pregnant . . . I hope you don't."

After Stacey was promoted, Dominguez applied for another position. Dominguez and another applicant, Phillip Andrews, both ranked fifth in the interview process. Andrews had a college degree in a related field, attended law school for two years and had three years of experience in a similar position in Wyoming. In contrast, Dominguez graduated from high school, attended vocational school and community college and had worked in a similar position in the Department for several years. Both applicants were interviewed by Stacey and another Department employee, Mark Elicegui. Following the interviews, Stacey and Elicegui independently concluded that Andrews was most qualified for the position. Andrews was offered, and accepted, the position.

Dominguez sued the Department and Stacey alleging, among other things, that she had been subjected to a hostile work environment and that she was not promoted on the basis of her gender. The district court granted summary judgment and the Ninth Circuit reversed.

To prevail on a hostile work environment claim, Dominguez was required to present evidence that she perceived her work environment to be hostile and that a reasonable person in her position would perceive it to be so. The Ninth Circuit held that Dominguez had presented sufficient evidence. Dominguez testified that Stacey made numerous demeaning comments about women in the work place such as "women should only be in subservient positions" and "women have no business in construction." Moreover, Stacey acknowledged that he frequently made "joking comments" about women and he would occasionally make comments about "husbands, ex-husbands, boyfriends, female problems and pregnancy symptoms." Based on this evidence, a jury could conclude that Stacey's repeated derogatory and humiliating remarks were sufficiently severe and pervasive to constitute a hostile work environment.

With respect to the failure to promote claim, Dominguez was required to establish that: (1) she belonged to a protected class; (2) she applied for and was qualified for the position she was denied; (3) she was rejected despite her qualifications; and (4) the employer filled the position with an

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Patti R. Roberts is a sole practitioner in Oakland emphasizing in plaintiff's employment law. She is an Advisory Member of the Executive Committee of the State Bar's Labor and Employment section, and Co-Chair of the National Lawyer's Guild's Civil Rights committee. She is on the faculty of San Francisco City College's Labor Studies Department and S.F. State's Paralegal Certificate Program.

Book Review

By Patti R. Roberts

EMPLOYMENT DISCRIMINATION DEPOSITIONS: LAW, STRATEGY AND SAMPLE DEPOSITIONS

By Anthony J. Oncidi and Brett Thomas, Juris Publishing, 2005, 400 pages, 1 volume, looseleaf, $170.00 [$161.50 online]

This well-written hands-on text thoroughly covers issues related to the taking of depositions in employment cases. It is well-organized and very useable and will be helpful to both the beginning and experienced practitioner. Since depositions are often the most important discovery technique in an employment case, this step by step "how-to do it" text is definitely something to consider adding to your library.

Perhaps the most useful part of the text is the extensive collection of forms, which takes up more than half of the text. The forms range from a comprehensive section of introductory questions, to sections of questions on more substantive areas, such as prior disciplinary history, prior lawsuits, "at will" status, and various forms of discrimination, including family medical leave, gender, age and disability. The thoroughness of the questions covering different area varies, and some of the subject areas could be expanded. For example, the series of questions concerning sexual orientation are pretty basic, and probably would not add much information to the prepared litigator, yet other sections are very comprehensive and useful. Perhaps in future versions, we will see an expansion of some of these areas.

Though the text has an index, the absence of a table of cases and a more complete analysis of relevant cases that come up in the discovery context is somewhat surprising. For example, the text doesn't seem to address the issue of after acquired evidence though it does discuss questioning concerning an employee's resume. Since there is no mention in the index, locating specific issues, such as this, may not always be easy.

The book is presumably written for a national audience, rather than just for California practitioners. However, since plaintiffs in California are increasingly filing their discrimination, age and disability cases in state rather than federal courts, some relevant areas of state practice are simply not covered, which is too bad. One area not covered in this first edition, that might be useful to add in future editions, is the specific use of deposition testimony in the preparation of motions for summary judgment or adjudication, both from a plaintiff and defense point of view.

This is a valuable text for the employment practitioner, and we should be seeing it on more and more bookshelves.

Book Review

By David Borgen

David Borgen represents employees in class action wage/hour and discrimination litigation at Goldstein, Demchak, Baller, Borgen & Dardarian in Oakland, California.

GETTING EVEN: WHY WOMEN DON'T GET PAID LIKE MEN—AND WHAT TO DO ABOUT IT

By Evelyn F. Murphy with E.J. Graff (Simon & Schuster, Inc., 2005)

Back in the Sixties, a female folk singer used to lament that women were paid "Fifty-nine cents for every man's dollar." Today the wage gap is 77 cents. Why are women still lagging behind men? What are the costs to women? What can be done about it?

Getting Even, by former Massachusetts Lieutenant Governor Evelyn Murphy, is a challenging book about the persistence of the wage gap between male and female workers in America's economy.

First, *Getting Even* makes it clear that the wage gap (23 cents an hour) is not due to women working part time or opting out of the work force. The comparison is for full time wages and does not reflect part time work or maternity leaves. Second, the wage gap spans all income categories and occupations. Third, it doesn't appear to be going away any time soon despite the panoply of laws that we are familiar with as employment lawyers.

Getting Even is not only about statistics. It presents compelling anecdotes that bring to life the costs (emotional and financial) of the wage gap. Getting Even is about women struggling to feed their families, not being able to repair their cars (or being able to buy better cars), and not being able to pay for swimming lessons for the kids. The wage gap means less money for new shoes and less money for retirement. *Getting Even* estimates that professional women (including women lawyers) lose $2 million over the course of their careers.

Getting Even concludes that the wage gap is caused by discrimination. The proof is not only in the anecdotal evidence but in the detailed analysis of hundreds of gender discrimination lawsuits tried to judgment and settled over the past several years. *Getting Even* summarizes the evidence from many class actions, including our firm's Home Depot gender discrimination class action. In our Home Depot case (settled for $87.5 million) we amassed evidence that women were hired into lower wage positions and denied promotions based on explanations like women didn't want to get dirty or women didn't want to climb ladders. *Getting Even* also looks at landmark gender discrimination lawsuits against Mitsubishi and Rent-A-Center to show how discrimination works to deny women equal pay and access to higher paying jobs. In sum, sexual stereotypes, sexual harassment, pregnancy discrimination, "mommy tracking," and outmoded ideas about what constitutes "women's work" all continue to cost women equal opportunities in case after case are examined in *Getting Even.*

Getting Even shows us that even women who sue their employers rarely recoup all their losses. While litigation serves a role in "getting even," it is clearly not enough. *Getting Even* outlines a plan for closing the wage gap that requires women to investigate and organize in the workplace in order to expose (with hard data) the existence of the wage gap within each workforce. *Getting Even* argues that women must confront CEOs to get them to analyze their personnel data and to take action to reform compensation systems that pay women less than their male counterparts. *Getting Even* shows how some employers, like MIT, have voluntarily analyzed their own payroll data even without a pending lawsuit and have taken proactive steps to correct their wage gaps.

Getting Even is engaging. It even comes with its own Web site—www.wageproject.org—to assist women in challenging the wage gaps they encounter in their own lives. It confronts the reader with the reality of the wage gap and challenges us to do something about it. Decades after the passage of Title VII in 1964 and after thousands of lawsuits, the wage gap is still with us and can still be found everywhere. *Getting Even* will inspire those of us who represent underpaid women workers (to file more lawsuits) and should motivate our colleagues who represent employers to meet with their CEO clients to close their wage gaps before their female employees find their way to our offices.

ADR Case Notes

By Lois M. Kosch

Lois M. Kosch is a partner at Wilson Petty Kosmo & Turner in San Diego. She specializes in counseling and representation of employers on all aspects of employment law and litigation. Ms. Kosch is co-editor-in-chief of this law review and a member of the Labor and Employment Law Section's Executive Committee.

The recent case law in this area reflects the continuing debate over the enforceability of class action waivers. The debate has now moved into the employment arena.

In *Robert Gentry v. Superior Court*, 135 Cal.App.4th 944 (2006), the second appellate district considered the enforceability of a pre-employment arbitration agreement containing a class action waiver. In this case, a former employee of Circuit City Stores filed a class action claiming he and other customer service managers were improperly classified as exempt from overtime. During his employment Gentry received a packet of materials on dispute resolution which afforded employees various options (including arbitration) for resolving employment-related disputes. The agreement to arbitrate included a class action waiver and clearly spelled out both the pros and cons of arbitration. The packet included a form that gave employees 30 days to opt out of the arbitration agreement. Gentry did not opt out.

This is the first case to consider the issue of class action waivers in the employment context following the California Supreme Court's decision invalidating the class action waiver in a credit card agreement in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005). The *Gentry* court distinguished *Discover Bank* on several factual grounds and found Circuit City's arbitration agreement to be neither procedurally nor substantively unconscionable and thus enforceable.

First, the court held that the arbitration agreement was not adhesive because it was not a condition of Gentry's employment. He was given 30 days to opt out of the agreement, which he did not do. Conversely, the consumer in the *Discover Bank* case had no opportunity to opt out of arbitration unless he closed his account. Moreover the announcement of the adoption of an arbitration provision was contained in a mail stuffer the consumer was unlikely to read. In addition, the *Discover Bank* case involved consumers with small amounts in damages, thereby nearly assuring no one would bother to file an individual lawsuit. In *Gentry*, on the other hand, the plaintiff's alleged statutory violations could result "in substantial damages and penalties should he prevail on his individual claims." (*Id.* at 951.) Thus, plaintiffs such as Gentry would not be deterred from filing individual lawsuits, as was the case in *Discover Bank* where individual damages were limited to a $29.00 late fee.

Employment counsel may wish to follow the status of the *Gentry decision* to ensure that the California Supreme Court does not either depublish the decision nor grant review of the case, before relying on it to rewrite arbitration agreements to include similar terms where there is the potential for employment-based class actions.

Class Action Waiver in Credit Card Agreement Found Enforceable Following Discover Bank

It is of interest to note that the fourth appellate district recently held a credit card agreement with a class action waiver to be enforceable even after the California Supreme Court's decision in *Discover Bank*, supra. In *Jones v. Citibank, Inc.*, 135 Cal. App. 4th 1491(2006), the arbitration clause at issue gave cardholders the opportunity to opt out by providing Citibank with written notification of their desire to opt-out within 26 days of their statements' closing date. In this case the plaintiff had not opted out. Although the notice of the addition of the binding arbitration provision was explained in a bill stuffer, the court emphasized that the front of the billing statement contained language alerting the consumer to the information enclosed regarding the binding arbitration provision being added to their accounts. Moreover the insert explained that arbitration replaces the right to go to court, the right to a jury and the right to participate in a class action. Finally, the court noted that *Discover Bank* did not hold that class action waivers in consumer contracts of adhesion are *always* unenforceable. Rather, the Supreme Court found that they are only unenforceable under some circumstances. Since *Jones* was unable to prove procedural unconscionability due to the opt out option, plaintiffs were required to arbitrate.

No-Match Letters & Collective Bargaining

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Upon receipt of the letters, many employers demand employees provide re-verification of work authorization documents including, for example, new SSA cards or risk being terminated. Yet, federal immigration laws do not legally mandate such actions in response to SSA discrepancies. The Immigration and Nationality Act (INA) sets forth the employment eligibility verification system—more commonly known as the I-9 process– which requires that employers verify work authorization within three days of hire. The INA makes it unlawful for a person or company to *knowingly* hire an "unauthorized alien," or to hire an employee without complying with the verification provisions.[1] Section 274A(a)(3) of the INA provides employers with a defense to any alleged violations if the employer establishes it complied in good faith with the verification requirements.[2]

Once an employer has verified a worker's employment authorization within three days of hire, employers are to re-verify employment authorization only in limited circumstances. Re-verification is appropriate and obligated under the law when an individual's employment authorization expires[3] or in the event that the employer obtains actual or constructive knowledge that an individual is not authorized to work.[4] Because the SSA no-match letter does not provide actual or constructive knowledge that an individual is not authorized to work, an employer's obligations are not triggered and re-verification of documents is not appropriate.

Section 274B of the INA[5] makes certain practices regarding the verification of employment authorization unlawful, such as requesting more or specific documents than are required or refusing to honor documents tendered that on their face reasonably appear to be genuine.[6] The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), responsible for enforcing Section 274 B,[7] advises that an SSN discrepancy should not trigger I-9 re-verification.[8] In fact, the no-match letters specifically state in pertinent part: "The receipt of a no-match letter, standing alone, does not indicate to an employer that he or she need question the genuineness of documents or information previously presented to complete an INS Form I-9. This applies equally to the situation where the employee presents a Social Security card to establish employment eligibility . . . ."[9]

Similarly, under IRS regulations, an employer is not to take any adverse action against employees as a result of a no-match notification from SSA. Because SSA no-match letters issued in 2002[10] referenced potential IRS fines against employers for providing incorrect SSNs and because employers began taking adverse actions against employees, the IRS published guidelines on the proper manner in which to handle SSN discrepancies.[11] The IRS clarified that receipt of an SSA no-match letter would not trigger any penalty.

If an employer has received a notice from the IRS regarding a discrepancy with an employee's SSN,[12] the employer has a good faith defense to request a waiver of the penalty under IRS regulations. In order to benefit from this "safe harbor" provision, an employer must show it took reasonable steps to ensure it obtained accurate information. The employer must have made an "initial solicitation," namely the employer had the employee complete a W-4 form. In addition, the employer must demonstrate it solicited corrected information from the employee in response to the IRS notice. The employer has until December 31 of the year in which the notice was received to make the solicitation. If in the subsequent year an employer receives another IRS notice advising of a discrepancy, then the employer is again required only to make a second solicitation. "If the employer receives further IRS notices based on the missing or incorrect SSN of the employee after having made two annual solicitations, the employer is *not* required to make any further solicitations. The employer's initial and two annual solicitations demonstrate that it has acted in a responsible manner before and after the failure and will establish reasonable cause under the regulations."[13]

Guidance from various federal agencies has helped the majority of employers who have genuinely been confused about their legal responsibilities. However, there is a smaller group of employers that has conveniently used the no-match letters and similar programs to interfere with their employees' labor and employment rights. Fortunately, for those workers that are covered by union collective bargaining agreements, the "just cause" provisions in those contracts provide the best protection and remedy for any acts taken by employers to retaliate against workers for exercising their rights or simply to replace higher paid long-term workers with lower-paid new hires. Action by employers, of the type described above, almost never satisfies the "just cause" standards provided for in collective bargaining agreements, and, therefore, increase that employers' liability.

LABOR ARBITRATION DECISIONS

Several arbitrators have held that a notice from the SSA of a discrepancy or a no-match is not "just cause" for termination. The first is *Hotel Employees and Restaurant Employees Union, Local 2 and San Francisco Travelodge Joint Venture*.[14] There, the employer received a SSA no-match letter in March 1999. On April 9, 1999, the employer met with the employees named in the no-match letter and gave them one week to obtain a SSA letter showing a correction as proof of their eligibility for continued employment. On April 17, 1999, seven housekeeping employees were terminated. The arbitrator, however, found that the no-match letter was not "just cause" for termination and, as a result, the employees were reinstated and made whole. The employer's rule was deemed unreasonable because compliance was impossible. The employer had failed to show that the seven workers were not authorized to work or that it would have been subject to IRS penalties.

Similarly, the arbitrator in *Gila's Jewel Box, Inc. d/b/a The Box Tree and Local 100, Hotel Employees and Restaurant Employees Union*[15] found no "just cause" for terminations based on a mismatch letter from the SSA and ordered reinstatement of the grievant. There, the employer received a notice that eight of its employees' records did not match the SSA's records. The notice stated it did not imply the employer or employee provided incorrect information, was not "in and of itself" a basis for the employer "to take any adverse action against the employee," and warned

any adverse action taken against the employee may violate state or federal law.

The employer gave the employees two months to correct the information and/or submit new SSNs. All of the employees but the grievant submitted updated SSNs. The employer terminated the grievant, but gave an unconditional offer of reinstatement whenever the grievant submitted "valid documentation indicating his ability to work in the United States."

Notably, the employer had the burden of proof to demonstrate that, at the time the grievant was terminated, it had "just cause" to "bar his employment." To meet that standard, the employer needed to show the grievant was not legally allowed to work. *Gila's Jewel Box* found the employer did not have "just cause" to terminate the grievant, because it relied solely on the SSA no-match letter and the passage of time, not proof that the grievant was unauthorized to work.

In *Salisbury Hotel and the New York Hotel & Motel Trades Council, AFL-CIO, Local 6*,[16] the arbitrator awarded an employee reinstatement with full back pay and benefits. The *Salisbury Hotel* arbitrator held that receiving a SSA no-match letter "does not give an employer the right to take adverse action against [the] employee unless it has additional information clearly indicating that the employee's status is that of an [undocumented worker] under law."

The employer terminated the grievant after receiving the last of three SSA no-match letters and after providing the grievant with a leave of absence to correct the discrepancy. Under the provisions of the Immigration Reform and Control Act of 1986 (IRCA), the worker was deemed a "grandfathered" employee.[17] The employer was not required to complete a Form I-9 for the grievant and in fact had not done so. The *Salisbury Hotel* decision specifically held, "There is simply no basis to conclude that the Hotel had actual or constructive knowledge that the grievant's status would place the Hotel in jeopardy" of employer sanctions under the IRCA. A no-match letter from the SSA does not provide the employer with such information."

More recently, the arbitrator in *Service Performance Corporation and Service Employees International Union, Local 1877*,[18] held the employer did not have "just cause" based on "no-match" information to terminate its employees. Unlike employers that received unsolicited SSA notices of discrepancies, the employer here voluntarily contacted the SSA's telephonic employer verification service.

This case involved a successor employer that had acquired the maintenance contract for a building in Oakland. When the maintenance contract was transferred from the predecessor contractor, the successor required all workers in the building to re-verify their employment eligibility by completing new I-9 Forms and re-presenting their documents proving employment eligibility.[19] After accepting the workers' documents, the successor took the extra step of verifying the SSNs by calling SSA on its own volition. The SSA's employment verification system notified the employer that the information submitted for three employees did not match its records. The employer notified the grievants that they could not work until they cleared up the discrepancies.

The decision found "[t]he no-match information the Employer received from the [SSA] does not constitute 'just cause' either by the terms of this contract, or by the rules of the Social Security Administration." In addition, "[t]he appropriate remedy is to reinstate the Grievants to their former positions . . . with full back pay and benefits, less any outside earnings the employees have received in the interim."

The employer was deemed under "no obligation . . ., either by the terms of the Collective Bargaining Agreement, or by the terms of law, . . . to call the SSA to determine whether the social security numbers on the I-9 Forms matched the records the SSA." The decision rejected the employer's arguments that the workers were "new hires" and therefore not subject to the "just cause" provisions of the collective bargaining agreement. Specifically, pursuant to the terms of the collective bargaining agreement, the successor employer was "specifically prohibited from treating permanent employees as 'new hires.'" The decision also rejected the employer's argument that it took the additional step of checking with the SSA because of the possibility of civil or criminal liability. Further, an investigation of its parent corporation by the U.S. Attorney did not give the employer the right "or justification for violating the terms of the Collective Bargaining Agreement, which it signed."

Most important, the decision held that SSA no-match information does not establish whether an employee is legally eligible to work since many factors can cause a "no-match." "When this Employer called the [SSA] and discovered that the three Grievants in the present case had no-match social security numbers it knew nothing more about their legal status to work in the United States than it did before it made the call to [SSA] . . . . Upon completion of the I-9 Form, the Employer had no reason to believe that the three employees were not legally permitted to work in the United States."

The decision also held a successor employer had two options for verifying whether the building's workers were authorized to be employed in the U.S.: (i) it could have acquired the workers' previously completed I-9 forms from the previous employer;[20] or (ii) it could have required workers to complete new I-9 forms. "Once those employees had filled out the new I-9 Forms, assuming they provided documents that were facially appropriate and did not cause the Employer to have any suspicion that they were fraudulent or improper, the Employer then complied with its obligation and no further action should have been taken." The decision highlights the importance of a union contract in protecting workers' rights.

ARBITRATION DECISIONS DISTINGUISHING *HOFFMAN PLASTIC COMPOUNDS. V. NLRB*

The Supreme Court's decision in *Hoffman Plastic Compounds. v. NLRB*[21] is an important decision that affects the rights and remedies available to undocumented workers in limited circumstances. In *Hoffman*, the Court focused specifically on the remedies available for undocumented workers who suffer a labor law violation under the National Labor Relations Act (NLRA).[22]

In *Hoffman*, California factory worker Jose Castro was fired for union organizing activities. The National Labor Relations Board (NLRB) ordered the employer to cease and desist, post a notice that it had violated the law, reinstate Castro, and provide him with back pay for his lost earnings.

During a compliance hearing on back pay, Castro admitted he had used false documents to establish work authorization and that he was an undocumented worker. The Supreme Court ultimately held that the NLRB could not award back pay under the NLRA to undocumented workers because the "legal landscape [had] now significantly changed"[23] since Congress had enacted the Immigration Reform and Control Act of 1986 (IRCA).[24] The Court also reinforced that undocumented workers are not entitled to reinstatement, one of the traditional remedies, along with back pay, for such violations. According to the Supreme Court, IRCA's prohibition against the hiring of undocumented workers requires the NLRB to deny back pay to undocumented workers because back pay would compensate them for work they could not have lawfully performed. The Court further held the NLRB did not have authority to interpret immigration policy and fashion an award that contradicted IRCA's prohibitions.

However, the *Hoffman* decision is limited to those cases where there is evidence in the record that the employee is undocumented. It specifically applies only to remedies available to undocumented immigrants under the NLRA. Despite its limited ruling, employers have attempted to use the *Hoffman* decision to limit reinstatement and back pay awards for workers, and to conduct invasive discovery into the immigration status of plaintiffs.[25]

As more and more decisions are rendered relating to SSN discrepancies, many employers have sought to distinguish their circumstances from existing arbitration decisions. For example, in *Seneca Foods Corporation and United Food and Commercial Workers Union, AFL-CIO, Local P-199*,[26] the employer argued that the Supreme Court's decision in *Hoffman* prevented the arbitrator from awarding reinstatement and back pay. The arbitrator disagreed and found *Hoffman* did not apply unless the employees are shown to be working unlawfully. *Seneca Foods Corp.* found that a SSA no-match letter is not "convincing proof" that workers are unauthorized and "does not provide the quantum of proof necessary to defeat an award of back pay for an unjust suspension."[27]

Most recently, *Aramark Facility Services and Service Employees International Union, Local 1877*,[28] found the employer violated the collective bargaining agreement when it terminated approximately 30 janitors who failed to resolve a "no-match" letter "or to provide evidence of having applied for new Social Security numbers in accordance with . . . the Company policy." In *Aramark*, reinstatement without loss of seniority, benefits or wages was ordered.

Like the employer in *Service Performance Corp.*, Aramark conducted its own verification of its employees' SSNs directly with SSA. After Aramark received notices from the SSA that the records provided by the employer did not match SSA's records, it issued a notice to the workers and gave them three days to return with new social security cards or with letters stating they were in the process of obtaining a new SSN. When they did not comply, the employer fired all 30 janitors.

The arbitrator found Aramark did not have "just cause" for termination based on its company policy. The employer had failed to meet its burden of proof with respect to the existence of the company policy prior to termination and presented no evidence the policy was ever distributed to employees or presented to the union. Accordingly, the company policy was determined to be "arbitrary, unreasonable, and discriminatory" "as applied."

CONCLUSION

Employers who choose to fire or to take other adverse action against workers because of a mismatch may be subject to liability ranging from unfair labor practice charges to retaliation or discrimination claims. Some employers may be subject to fines for violating the anti-discrimination provisions of the INA. The remedies available to workers who successfully litigate this issue include back pay and other monetary damages. As this area of law continues to evolve, it is clear that collective bargaining agreements and in particular the "just cause" provisions in those agreements protect workers and employers alike.

ENDNOTES

1. 8 U.S.C. §1324a(a).
2. 8 U.S.C. §1324a(b) details the employer's obligation to verify a worker's identity and authorization to work at the time of hire. Under this section of the law, the employee is given a choice of documents that establish her identity and work authorization. The employer then examines the document(s) presented by the employee, and if the document "reasonably appears on its face to be genuine," then the employer can continue to employ the worker." 8 C.F.R. §274a.2(b)(1)(ii); 8 C.F.R. 274a.4. The worker is required to sign the I-9 form and attest that she is authorized to work, (8 U.S.C. §1324a(b)(2)), while the employer attests on the I-9 form that it has verified the employee's authorization to work. 8 U.S.C. § 1324(b)(1)(A). So long as the employer complies with the I-9 verification requirement at the time of hire, it is covered by the "good faith defense." See, 8 C.F.R. § 274a.4.
3. 8 C.F.R. §274a.2(b)(1)(vii).
4. 8 C.F.R. § 274a.1(l)(1) states: The term *knowing* includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer: (i) Fails to complete or improperly completes the Form I-9; (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or (iii) Acts with reckless and wanton disregard for the legal consequences permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.
5. *See* 8 U.S.C. §1324b.
6. *See* 8 U.S.C. § 1324b(a)(6).
7. *See* 8 U.S.C. §1324b
8. *See* Letter from the Department of Justice, Office of Special Counsel for Immigration- Related Unfair Employment Practices dated April 1, 2004, on file with Author.
9. *Id.*
10. SSA no-match letters no longer reference this IRS penalty given the confusion this created among employers.
11. *See* Reasonable Cause Regulations and Requirements for Missing and Incorrect Names/TINS, IRS Publication 1586 (Rev. 12-2004), Catalog Number 13597U

12. For purposes of the IRS, an individual's SSN is equivalent to their Tax Identification Number (TIN).
13. *Id.* at 9.
14. *Hotel Employees and Restaurant Employees Union, Local 2 and San Francisco Travelodge Joint Venture*, No. 74-30-63-99, Arbitrator Luella Nelson (May 3, 2000); unpublished decision on file with the author.
15. *Gila's Jewel Box, Inc. d/b/a The Box Tree and Local 100, Hotel Employees and Restaurant Employees Union*, No. 13-300-02261-01, Arbitrator Jay Nadelbach (February 19, 2002); unpublished decision on file with the author.
16. *Salisbury Hotel and the New York Hotel & Motel Trades Council, AFL-CIO, Local 6,* No. 2004-112, Arbitrator Elliott Shriftman (Nov. 9, 2004); unpublished decision on file with the author.
17. *See* INA § 274A(a)(1),(2). The employer is not legally required to verify the employment eligibility of any worker it hired prior to November 6, 1986
18. *Service Performance Corporation and Service Employees International Union, Local 1877*, Case No. 04-292, Arbitrator Gerald R. McKay (January 12, 2005); unpublished decision on file with the author and available from Weinberg, Roger & Rosenfeld.
19. These workers had already completed Forms I-9 and presented documents proving employment eligibility to their former employer, the predecessor contractor.
20. *See* 8 U.S.C. § 1324a(6)(A); see also 8 C.F.R. § 274a2.
21. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 140 (2002).
22. 29 USCS § 151 et seq.
23. *Id.* at 137.
24. 8 U.S.C.S. § 1324a.
25. *See River v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004) (upholding protective order prohibiting inquiries into immigration status in Title VII national origin discrimination case).
26. *Seneca Foods Corporation and United Food and Commercial Workers Union, AFL-CIO, Local P-199*, FMCS Case No. 02-12654, Arbitrator Sara D. Jay (September 12, 2004); unpublished decision on file with the author.
27. *Id.* at 15-16.
28. *Aramark Facility Services and Service Employees International Union, Local 1877*, Arbitrator George Marshall (December 19, 2005); unpublished decision on file with the author and available from Weinberg Roger & Rosenfeld.

MCLE Self-Assessment Test

MCLE CREDIT
Earn one hour of general MCLE credit by reading ***Social Security Administration No-Match Letter and Union Collective Bargaining Agreements*** and answering the questions that follow, choosing the one best answer to each question. Mail your answers and a $25 processing fee ($20 for Labor and Employment Law Section members) to:

Labor and Employment Law Section
State Bar of California
180 Howard Street
San Francisco, CA 94105

Make checks payable to The State Bar of California. You will receive the correct answers with explanations and an MCLE certificate within six weeks. ***Please include your bar number and e-mail.***

CERTIFICATION
The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing education. This activity has been approved for minimum education credit in the amount of one hour.

Name _____ **Bar Number** _____ **E-mail** _____

1. The Social Security Administration (SSA) issues a "no match" letter to inform workers that their earnings are not being properly credited.
❑ True ❑ False

2. Not having authorized working documents is the only reason for a mismatch in earnings.
❑ True ❑ False

3. The no-match letters prove wrongdoing by either the employer or employee.
❑ True ❑ False

4. Federal immigration laws mandate that employer re-verify work authorization documents from employees with no-match letters.
❑ True ❑ False

5. Re-verification is appropriate and required when an individual's employment authorization expires or if the employer obtains actual or constructive knowledge that an individual is not authorized to work.
❑ True ❑ False

6. Federal immigration law requires that employers verify work-authorization of workers within three days of hire.
❑ True ❑ False

7. Employers are required to comply with the procedures in the I-9 form when verifying employment authorization and identity of new-hires.
❑ True ❑ False

8. An employer that complies with the I-9 employer verification process at the time of hire is covered by the "good faith defense."
❑ True ❑ False

9. It is unlawful for an employer to request more or different documents than are required under the law or refusing to honor documents tendered that on their face reasonably appear genuine.
❑ True ❑ False

10. Under IRS regulations, an employer must take adverse action against employees as a result of a no-match notification from SSA or be fined.
❑ True ❑ False

11. If an employer has received a notice from the IRS regarding a discrepancy with an employee's social security number (SSN), the employer has a good faith defense to request a waiver of the penalty under IRS regulations under the "safe harbor" provision.
❑ True ❑ False

12. For IRS purposes, the employer needs to solicit corrected SSN information on a W-4 form only once.
❑ True ❑ False

13. Collective bargaining agreements cannot impact employer re-verifications based on no-match letters.
❑ True ❑ False

14. In the collective bargaining context, the employer has the burden of proof to demonstrate that it had "just cause" to bar an employee from working at the time the employee was terminated
❑ True ❑ False

15. A successor employer has two legally required options for verifying whether employees are authorized to be employed by: 1) acquiring their previously completed I-9 forms from the previous employer; or 2) requiring employees to complete new I-9 forms.
❑ True ❑ False

16. *Hoffman Plastic Compounds v. NLRB.,535 U.S. 137*, 140 (2002) is limited to those cases where there is evidence in the record that the employee is undocumented.
❑ True ❑ False

17. *Hoffman* restricts back pay and reinstatement remedies to undocumented workers under the National Labor Relations Act.
❑ True ❑ False

18. A SSA no-match letter is "convincing proof" that the employee is unauthorized and may defeat an award of back pay and other job action.
❑ True ❑ False

19. Employers that terminate or take other adverse actions against workers because of a mismatch may be subject to liability ranging from unfair labor practice charges to retaliation or discrimination claims.
❑ True ❑ False

20. Employers cannot be fined for taking adverse actions against employees under the INA.
❑ True ❑ False

Howard Stern's Lame Duck Lessons

continued from page 2

period wore on, the more the inherent tension between Howard and CBS built. The cordiality that previously existed between the two sides devolved into petty on-air sniping, formal reprimands (Howard was suspended for a day for purportedly talking about Sirius too much during a November 2005 broadcast), and threatened legal action (Howard received several cease-and-desist letters warning him against promoting Sirius). Particularly sad were the frequent on-air fights between Howard and Chiusano, who had worked together for 20 years. Had Howard simply left CBS shortly after announcing his plans to move to Sirius, much of this conflict and ill-will could likely have been avoided.

Employers should recognize that the longer lame duck employees remain in the workplace, the greater the likelihood that whatever relationships still exist between the employers and soon-to-be-former employees will be compromised. Employers should therefore keep lame duck relationships as short as possible (usually between two and four weeks, at most).

Lesson #2: Respect the contract

Another important lesson from Howard's lame duck time is that contracts, where applicable, should factor prominently into decisions whether and how long lame duck employees should be retained. CBS' decision to keep Howard on-the-air during his lame duck period was undoubtedly influenced significantly by the fact that Howard was still under contract with CBS through December 2005.[3]

Had CBS taken Howard off-the-air prior to December 2005, it likely would have had to pay him millions for breaching the contract.[4] Thankfully, most employers will never encounter situations where they might expose themselves to multi-million dollar contractual liability for immediately terminating a lame duck employee. Those situations generally occur only with high-ranking, president/director/CEO employees who have lucrative contracts for fixed periods of time. What is far more common is when employers, either through employment agreements, handbooks or personnel policies, ask their employees to provide a certain amount of advance notice (usually two weeks) before they quit. Employers should treat requests for advance notice as implied promises that they will either continue to employ, or pay, their employees through the duration of the notice time.

Employers should recognize whether and to what extent their employees are subject to contracts that may affect the duration of the employees' lame duck time. Potential contractual liability is an essential part of the cost-benefit analysis when determining when to terminate a lame duck employee.

Lesson #3: Protect your work product

Yet another lame duck lesson to be gleaned from Howard's experiences is that departing employees will often try to take work product with them, regardless whether and to what extent the product is protected by contracts and/or intellectual property laws.

During broadcasts in November and December 2005, Howard and Chiusano engaged in heated arguments over whether Howard should be allowed to take hundreds of cartridges (called "carts") with him to Sirius. The carts were essentially audio tapes that contained recordings of old Stern show broadcasts on CBS. When Chiusano joked during one broadcast that he would have Stern show staff members searched to ensure that they were not smuggling carts out of the building, Howard claimed he had already taken everything he wanted months ago. CBS' lawsuit alleges Howard in fact took the carts and refuses to return them, thereby breaching his contract with CBS.

The cart dispute is indicative of the potential dangers that can arise when lame duck employees have access to confidential, proprietary and/or creative content. Although content that employees create while on-the-job is generally considered to be the "work-for-hire" of the employer, many employees either do not see things that way, or believe that there is such potential value in the content that they are willing to risk potential trade secret liability to continue using it (or both). Generally, the more skilled or creative the employees, the more they believe they have inherent rights to own and/or use the works they create. Given this mindset, it is perhaps not surprising that employees often try to take their work product with them whenever they change employers. This tendency is only magnified when lame duck employees are involved. Lame duck employees are uniquely situated with regard to both motive (i.e., they are leaving) and opportunity (i.e., they are still working with their previous employers) to steal trade secrets.

Employers should take steps to either monitor or eliminate employees' access to confidential content and information during lame duck times. In some cases, employers should even monitor lame duck employees' access to, and/or activities with, office equipment and supplies. Lame duck employees sometimes take office supplies and/or equipment from their employees on the theory that, overall, they gave far more to their employers than they received (thus the pilfered materials represent a modicum of deferred compensation). The more embittered and/or disgruntled the employee, the more he/she may try to take. When Damon Dash, co-founder of the Rocawear clothing label, left the company

in December 2005, he took everything he possibly could from his office, including door hinges and window blinds.

Lesson #4: Lame duck time hurts employees, too

A lesson Howard taught on a recurring basis during his last year at CBS was that employees generally do their worst work during lame duck times, thereby making themselves look bad in the process.

Howard's live broadcasts in 2005 were dominated by three topics: Sirius, Howard's perception that he was being targeted by the federal government in the wake of the Janet Jackson Super Bowl incident, and his dissatisfaction with CBS. All were interesting…for a time. But Howard obsessed over the topics for so long that even his most loyal listeners grew bored and disinterested. The contrast between Howard's pre and post-announcement shows was most evident when old "Best Of Stern" broadcasts were played during Howard's vacations and suspension in 2005. Howard's more recent, whiney shows paled in comparison to his older, lighthearted shows, such as the 2002 broadcast of the "Nearlywed Game," a self-explanatory send-up of the 1960's game show that ended in a heated (and hilarious) debate over whether vinaigrette and oil-and-vinegar are the same thing. For the record, they are not.

Not surprisingly, employees typically are not motivated to do their best work during lame duck times. Rarely do employees do more than a bare minimum of work for their old employers during lame duck periods; their focus is already on the future with their new employers. And while this lack of motivation undoubtedly impacts employers, it also may hurt lame duck employees as well. If employees act openly disinterested or dismissive during lame duck times, they may alienate potential future clients and/or coworkers with whom they interact.

Lesson #5: Beware the poison well

The last and perhaps most important lesson to be taken from Howard's lame duck time is that there are myriad ways in which lame duck employees can influence and/or taint the relationships employers have with both their clients and their other employees.

Most of CBS' lawsuit is dominated by allegations that, during his lame duck time, Howard aggressively (and unfairly) promoted Sirius during his CBS broadcasts. Despite his initial promises not to take advantage of his on-air forum with CBS, Howard in fact served as an obvious (and, according to many, effective) commercial for Sirius for most of his lame duck time. Just prior to Thanksgiving 2004, Howard walked through the streets of New York handing out Sirius radios, an event he previously promoted on CBS. He also repeatedly extolled the virtues of satellite radio during his CBS broadcasts; helped cross-promote Sirius by having its radio personalities on his CBS show as guests (including former Saturday Night Live comic Jim Breuer, who hosts a "Breuer Unleashed" show on Sirius); and he began a "cliffhanger" contest on his CBS show that culminated on Sirius (thereby enticing listeners who followed the contest to tune in to Sirius to hear the results).[5] Sirius received almost three million new subscriptions between the time of Howard's announcement and his first broadcast on satellite radio.

In addition to using his lame duck time to lure potential listeners away from CBS, Howard also disrupted employee relations at CBS Radio. The ongoing battles between Howard, Moonves, Chiusano, and Hollander galvanized CBS employees to "choose sides," thereby creating open and obvious division in the workforce. Staffers who were loyal to Howard were openly disrespectful toward Chiusano and CBS.

Employers should recognize and understand that they can put themselves in extremely vulnerable positions whenever they allow lame duck employees to continue working too long. Employers essentially trust that the lame duck employees will not attempt to steal the employers' clients, disrupt the employers' business relationships, and/or sew seeds of dissent among other employees. For these reasons, employers are cautioned not to allow lame duck periods to continue any longer than is necessary pursuant to contract, and/or to adequately transition the lame duck employees' job duties.

For further information on lame duck employment relationships or any other employment related issues, please contact Rob Nelson at rnelson@cdhklaw.com.

ENDNOTES

1. Situations where employers notify employees of their impending terminations but nonetheless permit them to remain employed while they search for other jobs are not lame duck relationships because the employees do not continue working for their employers during the lame duck time.
2. Stern's contract was in fact with Infinity Broadcasting, which was owned by CBS. In December 2005, CBS officially renamed Infinity "CBS Radio."
3. CBS also clearly wanted to maximize the considerable revenues Howard's show generates for as long as it could.
4. The value of the remainder of Howard's CBS contract after he made his October 2004 announcement has not been reported. Howard is notoriously shy about publicizing his private financial matters. In 1994, he dropped out of the New York gubernatorial race because he did not want to make the financial disclosures that were required of all candidates.
5. In the contest, various members of the show told embarrassing secrets to a designated "secret keeper," who then revealed the secrets after the show moved to Sirius. Listeners were asked to guess which secrets came from which show members. Not surprisingly, many of the secrets involved sex (one show staffer admitted spending in excess of $10,000 on porn and porn-related products). Howard's secret was disappointingly lame (and obvious): he recently had a nose job.

Rethinking Individual Liability

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on such conduct can only be made against their employer.

In arriving at the conclusion that such actions may not give rise to personal liability because they "arise out of the performance of necessary personnel management duties" and are "an inherent and unavoidable part of the supervisory function," the Court carefully distinguished such actions from unlawful harassment.[11] The court accordingly drew a very clear line between "commonly necessary kinds of personnel management actions" and the kind of unlawful harassment for which individual employees may be held personally liable under § 12940(j), reasoning that the former kind of conduct was "avoidable" while the latter was not. When retaliatory actions are alleged to consist of personnel decisions that managers and human resources administrators must unavoidably make on a daily basis, they therefore fall squarely within the kind of decision that the *Reno* court held may be made without the fear of incurring personal liability.

In reaching its decision, the *Reno* court sided with the *Janken* court's acknowledgment that imposing personal liability on supervisors for personnel management decisions would "severely impair the execution of supervisory judgment" by "subjecting them to the ever-present threat of a lawsuit each time they make a personnel decision."[12] The court therefore could not have been clearer in its intent to exempt individuals from personal liability for the very kind of "adverse employment actions" which are now required to establish a retaliation claim. Because the Supreme Court has recently defined the scope of activity that may support a retaliation claim as the very same kind of activity which individuals cannot be liable for engaging in under the anti-discrimination provisions of the statute, it would be senseless to conclude that individuals can be personally liable under the retaliation prong of FEHA for engaging in the exact same conduct. For example, it does not make sense that an individual supervisor cannot be subject to personal liability for terminating a female employee because of her sex, but can be personally liable for terminating her because she made a complaint of sex discrimination. In view of the fact that the act of terminating an employee is itself a "commonly necessary personnel management action" for which an individual cannot be held personally liable for under § 12940(a, the allegedly different motivation for that action should have no effect whatsoever as to whether the individual is personally liable under § 12940(h), *particularly now that the Supreme Court has held that a retaliation claim must be based on just such an action.*[13] Because only employers can "discharge, expel or otherwise discriminate" against employees, and individuals cannot be held personally liable for such conduct, only employers are now capable of committing the unlawful *employment* practice specified in subsection (h) of the statute.[14]

Limiting FEHA's retaliation provisions to employers is also entirely in accord with the regulations to the retaliation section of FEHA.[15] Those regulations specifically state that it is unlawful for "an employer or other covered entity" to take various employment-related actions against individuals for engaging in activity that is protected by the statute.[16] In addition, the California Approved Jury Instruction for retaliation claims under FEHA specifically states that a defendant must take an "adverse employment action" against the plaintiff, and that a retaliatory motive is established by showing that the plaintiff's "employer was aware of the protected activities . . ."[17] This result naturally follows from the fact that "adverse employment actions" may only be taken by employers, and not employees.

Precluding individual liability for retaliation is also consistent with the law which has developed for establishing the closely related tort of wrongful discharge. The courts have repeatedly concluded that a claim for wrongful discharge in violation of public policy can only be asserted against one's employer.[18] Once again, it would seem illogical to conclude that individual employees who are not subject to liability in tort for discharging an employee in retaliation for engaging in legally protected activity, could be held liable under the retaliation provisions of FEHA for the exact same conduct.

Thus, although § 12940(h) prohibits "persons" from retaliating against employees, it is clear that the only "persons" who can carry out the adverse employment actions on which a retaliation claim can now be based are employers. Because individual supervisors are not employers, they therefore cannot be held legally responsible for the personnel management actions that only their employer may now take, notwithstanding the language contained in § 12940(h).

ENDNOTES

1. 36 Cal. 4th 1028 (2005).
2. *Id.* at 1042 (emphasis provided).
3. *Id.*
4. Moreover, these same elements of a *prima facie* case for retaliation were set forth in *Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1453 (2002) and *Pinero v. Specialty Restaurants Corp.*, 130 Cal. App. 4th 635, 639 (2005).
5. The "deterrence" test was adopted by the Ninth Circuit Court of Appeals in *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000). The issue of whether that test, as opposed to one which requires that an employment action result in a "significant change in employee status," should be applied to federal Title VII claims is before U.S. Supreme Court in the case of *Burlington Northern Santa Fe Railway Co. v. White*, Case No. 05-259.
6. *Yanowitz*, 36 Cal. 4th at 1050 (emphasis added).
7. *Id.* at 1050-51.
8. 18 Cal. 4th 640, 662-3 (1998)
9. 46 Cal. App. 4th 55, 64-5 (1996)
10. *Reno*, 18 Cal. 4th at 663.
11. *Id.* at 646.
12. *Id.* at 652, 663.
13. Indeed, one district court has acknowledged that the law with respect to employee claims against supervisors for

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Supreme Court Upholds SPB's Exclusive Jurisdiction

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tration procedures set forth in the MOUs, thus bypassing SPB review altogether.[13] The procedures provided for review of the discipline first by a four-member "board of adjustment" and then, if the union elected to appeal on behalf of the employee, by an arbitrator. Neither the board of adjustment nor the arbitrator was required to apply the SPB's merit-based standards; nor were they required to adhere to judicial or SPB precedent. Decisions rendered under this process were subject to only the limited judicial review accorded other types of arbitration awards under Cal. Code Civ. Proc. § 1285, *et seq.* The agreements were ratified by the Legislature, which also enacted additional legislation to implement some of the provisions.

The SPB filed actions against both DPA and the involved unions (CDF Firefighters, International Union of Operating Engineers, and California State Employees Association)[14] for traditional mandate and declaratory and injunctive relief. It alleged that the MOU provisions and implementing legislation violated Cal. Const. art. VII, § 3, which provides that the SPB "shall … review disciplinary actions" taken against state civil service employees. In addition, the union representing state administrative law judges, the California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE), filed a similar petition challenging the Unit 8 MOU on the ground that its provisions amounted to unconstitutional "contracting out" of work that is traditionally performed by state administrative law judges. In all but one case, the Sacramento Superior Court ruled the processes unconstitutional and ordered the state and the unions to cease utilizing them.[15] The Third District Court of Appeal affirmed the trial court rulings holding the processes unconstitutional.[16] The Supreme Court granted review.

THE SUPREME COURT'S RULING

In a unanimous decision, the Supreme Court determined that this collectively bargained bypass of the SPB's disciplinary review function violated the mandate of art. VII, § 3(a), that the SPB "shall… review disciplinary actions." Reviewing the constitutional history, the Court found that the constitutional amendment established the principle that appointments and promotions in state service be made solely on the basis of merit and that this merit system was to be administered by the nonpartisan State Personnel Board.[17] The central function of the SPB, the court found, is to administer the state civil service based on the principle that appointments and promotions are made solely on the basis of merit.[18] The Supreme Court adopted the reasoning of the Court of Appeal that the SPB's adjudicatory authority to review disciplinary actions as set forth in art. VII, § 3(a) is a necessary counterpart to its power under art. VII, § 1(b) to appoint and promote public employees based solely on merit.[19] Thus, both courts reasoned, unless the SPB "could exercise a veto of the discipline imposed on state civil service employees, state agencies 'would be free to terminate an employee for spurious reasons in violation of the merit principle.'"[20] Therefore, the Supreme Court concluded, when a state civil service employee is removed from employment, the interest of the SPB in ensuring that a disciplinary action does not violate the merit principle is just as great as when an employee is selected for state civil service employment.[21]

The Court further determined that, because employee discipline is an integral part of the civil service system, the SPB's constitutional authority to review disciplinary actions is *exclusive* and a critical component of that system.[22] Therefore, the Court concluded, it would be inimical to the constitutionally mandated merit-based system to wholly divest the SPB of its authority to review employee disciplinary actions in favor of an MOU-created review board.[23] By vesting in the SPB the sole authority to administer the state civil service system, the Constitution recognizes that the task of developing and consistently applying uniform standards for employee hiring, promotion and discipline must be entrusted to a single agency, the SPB.

The Court rejected the argument that allowing employees to bypass review by the SPB in favor of private arbitration was analogous to prior cases in which the Court had rejected challenges to legislation that authorized specialized agencies, the Public Employment Relations Board (PERB) and the Fair Employment and Housing Commission (FEHC), to adjudicate claims involving state employees.[24] In so holding, the Court found that granting PERB statutory authority over unfair labor practices and FEHC authority over employment discrimination was consistent with the merit principle embodied in art. VII and did not undermine or compromise the SPB's jurisdiction to review disciplinary actions against state civil service employees. In both cases the agency "had a specialized function that supplemented rather than supplanted the central adjudicative function" of the SPB.[25]

The court also rejected the argument that employees may "waive" review of disciplinary actions by the SPB in favor of adjudication by another entity. Because the merit-based civil service system exists for the benefit of the public, not individual employees, "the public in general has a strong interest in ensuring that partisanship plays no role in selection and advancement within the state civil service."[26] The Court found that the public interest would be subverted by allowing "various ad hoc arbitral boards, operat-

ing beyond the control of the SPB and not bound to apply its merit-based standards," to review and reverse disciplinary actions.[27] Therefore, while an employee can decide not to exercise the right to appeal a disciplinary action at all, an employee cannot bypass review by the SPB in favor of an MOU-created board that lacks the constitutional authority to oversee the merit system and is not bound to apply merit-based standards.[28]

IMPACT OF THE COURT'S DUAL DECISIONS

Together, the Supreme Court's decisions in *SPB v. CSEA* and *SPB v. DPA* provide significant guidance on the role of collective bargaining within California's constitutional merit-based civil service system. While recognizing the statutory right of state employees and employees to negotiate terms and conditions of employment, the decisions make it clear that collective bargaining cannot override the constitutional merit principle under which the state civil service must operate, nor circumvent the central constitutional role of the SPB in ensuring protection of the merit principle. Future collective bargaining negotiations between the State and employee representatives will need to ensure that any negotiated agreements remain consistent with both the constitutional merit principle and the SPB's constitutional role in overseeing the state civil service to ensure protection of that merit principle.

ENDNOTES

1. 36 Cal. 4th 758 (2005).
2. 37 Cal. 4th 512 (2005).
3. *See also Seniority Can't Trump Merit - Preserving A Fair, Merit Based Selection Process For California's State Civil Service*, California Labor & Employment Law Review, Vol. 19, No. 5.
4. Cal. Const. art. VII, § 1(b).
5. Cal. Const. art. VII, § 3(a).
6. Cal. Gov't Code, §§ 19575, 19578.
7. Cal. Gov't Code, §§ 19582, 19583.
8. Cal. Gov't Code, § 19582; 2 Cal. Code Reg. §§ 52, 52.6.
9. Cal. Gov't Code, § 18681.
10. Cal. Code Civ. Proc. § 1094.5; *Boren v. State Personnel Board*, 37 Cal. 2d 634, 637 (1951).
11. *Skelly v. State Personnel Board*, 15 Cal. 3d 194, 217, fn. 31 (1975).
12. Cal. Gov't Code, § 19575.
13. Under some of the agreements, certain disciplinary actions, designated as "minor" could not be appealed at all to the SPB.
14. These labor organizations represented employees in State Bargaining Units 8 (firefighters), 11 (engineering and scientific technicians), 12 (craft and maintenance workers) and 13 (stationary engineers).
15. In the remaining case, the superior court dismissed the case based upon the claim that the SPB lacked standing to sue; this holding was overturned by the Court of Appeal and was not pursued further in the Supreme Court.
16. The Court of Appeal reaffirmed its decision after granting petitions for rehearing.
17. 37 Cal. 4th at 520 (citing *Pacific Legal Foundation v. Brown*, 29 Cal. 3d 168, 183-184 (1981)).
18. *Id.* at 526.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 527.
23. *Id.* at 526.
24. *See Pacific Legal Foundation v. Brown, supra*; *State Personnel Board v. Fair Employment and Housing Commission*, 39 Cal. 3d 422 (1985).
25. 37 Cal. 4th at 524.
26. *Id.* at 527.
27. *Id.*
28. *Id.*

Rethinking Individual Liability

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retaliation is not settled because "like discrimination claims," retaliation claims "are also founded on personnel decisions which are an inherent part of the supervisory function." *See Plute v. Roadway Package System, Inc.*, 141 F. Supp. 2d 1005, 1011 (N.D. Cal. 2001).

14. Indeed, in the introduction to its analysis of § 12940(h), the *Yanowitz* court stated that § 12940(h) made it an unlawful employment practice for an "employer" to engage in the prohibited conduct. *Yanowitz*, 36 Cal. 4th at 1035
15. Cal. Code Regs. tit. 2, § 7287.8.
16. The courts generally give deference to the Fair Employment and Housing Commission's regulations, when they are reasonable and consistent with statutory language. *Robinson v. City Yucaipa*, 28 Cal. App. 4th 1506, 1516 (1994).
17. *See* CACI 2505, and Sources & Authority thereto, citing *Fisher v. San Pedro Peninsula Hospita*, 214 Cal. App. 3d 590, 615 (1989).
18. *See Gantt v. Century Insurance*, 1 Cal. 4th 1083, 1095 (1992) (employees are protected against employers' actions that contravene fundamental state policy); *Phillips v. Gemini Moving Specialists*, 63 Cal. App. 4th 563, 576 (1998) (applying cases which held that "It is the employer, and not third parties, who can be held liable to the discharged employee in his or her suit for wrongful discharge in violation of public policy); *Sistare-Meyer v. Young Men's Christian Association*, 58 Cal. App. 4th 10 (1997) (no claim for wrongful termination in violation of public policy exists outside the employment relationship); *Weinbaum v. Goldfarb, Whitman & Cohen*, 46 Cal. App. 4th 1310, 1317-18 (1996).

Unilateral Implementation

continued from page 5

unilateral action. For example, speculative concern over the impact of Proposition 13 was determined by both the courts and PERB to be inadequate as a reason to engage in unilateral action.[13] Claims regarding the constitutional requirement that public agencies submit a balanced budget and the constitutional debt limitation provision have also been rejected.[14] Indeed, the Supreme Court suggested in the Sonoma County case that contractual monetary commitments could only be deferred if the fiscal emergency was so disastrous that the agency would be forced to cease operations if the crisis were not resolved.[15]

Operational necessity has been accepted in situations in which the public employer was compelled by statute to take action. Thus, in *Mt. Diablo* USD, the PERB determined that mandatory provisions of the Education Code regarding teacher layoffs, permitted the district to send out notices and implement some aspects of the layoff where the code provided for immutable dates for action.[16]

3. Expiration of Prior Contract

Generally, upon expiration of a collective bargaining agreement, the duty to bargain requires the employer to maintain the status quo without taking unilateral action as to wages, hours or other working conditions until the parties have negotiated to an agreement or exhausted the impasse procedures.[17]

On the other hand, contractual terms which are solely a product of the contract itself (e.g., provisions that relate to the employee organization's statutory rights) form an exception to this general rule. Since the existence of these terms presupposes the existence of a contract, once the agreement has expired, an employer may alter these conditions without bargaining with the union.[18] Examples include union security (private sector), management rights clauses, zipper clauses and no strike clauses.[19]

PERB has also adopted the reasoning of the U.S. Supreme Court in *Litton Financial Division*[20] and held that arbitration clauses do not continue in effect after expiration of a collective bargaining agreement except if: 1) the dispute involves facts and occurrences that arose before expiration; 2) the dispute involves post-expiration conduct that infringes on rights accrued or vested under the agreement; or 3) under normal principles of contract interpretation, the agreement to arbitrate survives expiration of the agreement. This holding however, was later modified by the State Legislature so that arbitration clauses under the Dills Act (applicable to state employees) and other provisions of a memorandum of understanding, survive the expiration of the agreement.[21]

If a provision in a collective bargaining agreement relates to a non-mandatory subject of bargaining (permissive

subject), PERB has held that the employer may make changes to the provision following expiration of the contract. Thus, in Eureka City School District, PERB found that a school district's unilateral change to a smoking policy was permissible following expiration of the contract.[22]

4. Impasse

A public employer may unilaterally implement changes to working conditions if it negotiates in good faith, the parties reach a bona fide impasse, and the employer exhausts its impasse procedure obligations in good faith.

Good Faith. The obligation to negotiate in good faith has been interpreted by the courts and the PERB to mean the subjective attitude which requires a genuine desire to reach agreement. In establishing the presence or absence of good faith, PERB and the courts generally review the totality of the circumstances. A party's willingness to exchange reasonable proposals and its attempts to reconcile differences during the bargaining process indicate an intent to bargain in good faith. However, the duty to bargain does not compel either party to make concessions. Insistence on a firm position, if sincerely held and explained, can also be consistent with the obligation to negotiate in good faith.[23]

Existence of Impasse. The state's public sector bargaining laws for public schools, higher education and state employees set forth the definition of impasse and the procedure for identifying the existence of an impasse. So too, do most local agency employer-employee relations resolutions/ordinances enacted pursuant to the Meyers-Milias Brown Act (MMBA), which does not define the term.[24]

The State Employer-Employee Relations Act (SEERA or Dills Act), which covers state employees, does not specifically define impasse or provide for formal determination of when an impasse exists. Instead, SEERA authorizes the parties to move on to mediation when no agreement has been reached after a reasonable period of time.[25] The Trial Court Employment Protection and Governance Act (TCEPGA) and the Trial Court Interpreter Employment and Labor Relations Act (TCIELRA) have provisions similar to those of the SEERA.[26]

The Educational Employment Relations Act (EERA)[27] provides a good working definition of an impasse. The EERA defines an impasse as "a point during negotiations over matters within the scope of representation at which the parties' differences in positions are so substantial or prolonged that future meetings would be futile."[28]

Unless the parties agree that they are at impasse, the existence of a bona fide impasse is a question of fact that must be determined on a case by case basis. PERB's regulations for determining the existence of an impasse provide helpful guidance to the parties.

> In determining whether an impasse exists, the Board shall investigate and may consider the number and length of negotiating sessions between the parties, the time period over which the negotiations have occurred, the extent to which the parties have made and discussed counter-proposals to each other, the extent to which the parties have reached tentative agreement on issues during the negotiations, the extent to which unresolved issues remain, and other relevant data.[29]

Exhaustion of Impasse Procedures. Unlike the private sector, which has no mandatory impasse procedures, most public sector laws require the parties to participate in good faith in the impasse procedures. Both EERA and HEERA impose such a duty. A breach of this duty, in the absence of a valid defense, is unlawful, and if committed by the employer, would preclude the employer from taking unilateral action.[30] Impasse procedures under these laws are not considered complete until the parties have met with a mediator, gone to fact finding, considered the fact finders' report and engaged in any post-fact finding negotiations.[31] Indeed, in Modesto City Schools,[32] PERB held that if one party makes significant concessions after issuance of the fact finders' report, the duty to bargain is reactivated and the other party commits an unfair practice if it refuses to negotiate (or unilaterally implements). If the parties again reach a deadlock, the obligation to negotiate ceases, and the employer is then free to implement terms and conditions of employment.

Unlike EERA and HEERA, impasse resolution under SEERA is limited to mediation. Like EERA and HEERA however, SEERA requires the parties to participate in good faith in the impasse procedures. A breach of this duty constitutes an unfair practice, and if committed by the employer would preclude the employer from taking unilateral action.[33] Mediation is permissive under both the TCEPGA and the TCIELRA. However, like the other laws described above, the employer's failure to participate in the impasse procedure in good faith is unlawful.[34]

Under the MMBA, local agencies, based on procedures they adopt pursuant to the MMBA, generally have an impasse meeting/governing body hearing procedure, as well as occasionally, mediation and interest arbitration.[35] Local agencies must strictly adhere to their own procedures. Failure to participate in the agency's mandated impasse procedures is an unlawful practice and will preclude an employer from taking unilateral action.[36]

Authorized Unilateral Actions. If the public employer has negotiated in good faith, reached impasse and exhausted the impasse procedures in good faith, it may legally and unilaterally adopt changes to wages, hours and other terms and conditions of employment. Under most public sector labor laws the employer may implement changes consistent with offers it made to and which were rejected by the union. Thus, the changes implemented need not be exactly those offered during negotiations, but must have been reasonably comprehended within the prior proposals.[37] In practice, most public employers implement their last, best and final offer.

Under SEERA and the MMBA statutory language provides that following exhaustion of the impasse procedures an employer may implement its last, best and final offer.[38]

Where a public employer seeks to unilaterally implement proposals which are less generous than the status quo, the law may restrict the employer's ability to act. Certain benefits are deemed by the courts to be vested rights (e.g., pensions, longevity pay, vacation, retiree health insurance and other benefits that accrue based on years of employment). An employer is generally precluded from making unilateral changes to such benefits unless it provides comparable benefits to those affected by the change.[39]

Duration of the Unilateral Action. Unilateral actions have a limited duration.

Although an employer may lawfully implement a provision that defines the period for which the terms and conditions will be effective, from a practical standpoint, that period will not last longer than twelve (12) months. The reason is that most public sector laws provide that the recognized employee organization shall have a right to negotiate with the employer prior to the adoption by that agency of its next budget.[40] In addition, even though an employer has unilaterally changed terms and conditions of employment, the employer can be forced to return to bargaining table if there are changed circumstances, such as a substantive bargaining concession by the union.[41]

CONCLUSION

The duty to bargain in good faith is one of the hallmarks of public sector labor law. Unilateral employer actions without good faith negotiations and exhaustion of the impasse procedures usually constitute a violation of applicable public sector laws. While there are exceptions to this general rule—waiver, necessity, and contract expiration—these exceptions are narrowly construed.

If a public employer has negotiated in good faith, reached impasse, then exhausted required impasse procedures (in good faith), then the employer may unilaterally implement certain changes to wages, hours and working conditions.

ENDNOTES

1. *Public Employment Relations Bd. v. Modesto City Sch. Dist.*, 136 Cal. App. 3d 881, 900 (1982), following *NLRB v. Katz*, 369 U.S. 736, 745 (1962). The duty of the employer and exclusive representative to negotiate in good faith regarding mandatory subjects of bargaining is codified at Cal. Gov't Code §§ 3543.5(c) and 3543.6(c) of the Educational Employment relations Act (public school and community college districts); Cal. Gov't Code §§ 3571(c) and 3571.1(c) of the Higher Education Employer-Employee Relations Act (CSU, U.C system employees); Cal. Gov't Code §§ 3519(c) and 3519(c) of the State Employer-Employee Relations Act (state employees); Cal. Gov't Code § 3505 of the Meyers-Milias-Brown Act (local agency employees); Cal. Pub. Util. Code §§ 99563.7(c) and 99563.8(c) of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (MTA supervisors); Cal. Gov't Code § 71634.2 of the Trial Court Employment Protection and Governance Act (court employees); Cal. Gov't Code § 71818 of the Trial Court Interpreter Employment and Labor Relations Act (court interpreters); and 29 U.S.C.§§ 158(a)(5) and 158(b)(3) of the National Labor Relations Act (private sector employees). When interpreting the duty to negotiate the courts and the Public Employment Relations Board take guidance from cases interpreting the NLRA and California labor relations statutes with parallel provisions. (*See Firefighters Union v. City of Vallejo*, 12 Cal. 3d 608 (1974); *City of Whittier*, PERB Dec. No. 1761-M (2005).) Management is not obligated to negotiate over subjects that are outside the scope of bargaining. Hence, it may make unilateral changes to practices which are outside the scope of representation. See *Glendora Unified Sch. Dist.*, PERB Dec. No. 876 (1991). However, before unilaterally implementing any decision on a subject outside the scope of representation, the agency must first negotiate over the effects of that decision insofar as they affect matters within the scope of bargaining.
   A unilateral change in practice that does not change a term or condition of employment is not a breach of the duty to negotiate in good faith. *See City of Whittier*, PERB Dec. No. 1761-M (April 8, 2005) (overtime policy); *Trustees of the California State Univ.*, PERB Dec. No. 1751-H (February 8, 2005) (workplace violence prevention policy and guidelines).
2. *Public Employment Relations Bd. v. Modesto City Sch. Dist.,* 136 Cal. App. 3d 881.
3. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964); *Oakland Unified Sch. Dist. v. Public Employment Relations Bd.*, 120 Cal. App. 3d 1007, 1011 (1981)
4. *Placentia Unified Sch. Dist.*, PERB Dec. No. 595, (1986)
5. *Marysville Jt. Union High Sch. Dist.*, PERB Dec. No. 314 (1983); *See also California Dept. of Personnel Admin.*, PERB Dec. No. 995-S (1993) (change in released time); *Antelope Valley Union High Sch. Dist.*, PERB Dec. No. 1287 (1998) (change in promotional interview policy).
6. *Los Angeles Community College Dist.*, PERB Dec. No. 252 (1982); *Marin Community College Dist.*, PERB Dec. No. 1092 (1995).
7. *Independent Union of Pub. Serv. Employees v. County of Sacramento*, 147 Cal. App. 3d 482, 487-488 (1983). However, PERB has held that a general management rights clause that reserved to the employer the right to suspend employees allowed unilateral imposition of a short disciplinary suspension unlike anything used or contemplated by the parties at the time the clause was negotiated. *Mammoth Unified Sch. Dist.*, PERB Dec. No. 371 (1983).
8. *See Stockton Police Officers' Ass'n. v City of Stockton*, 206 Cal. App. 3d 62, 66 (1988) (request to negotiate not made until over three months after notice of proposed change); Stationary Engineers v. San Juan Suburban Water Dist., 90 Cal. App. 3d 796, 802; *Sylvan Elementary Sch. Dist.*, PERB Dec. No. 919 (1992); *Newman Crows Landing Unified Sch. Dist.*, PERB Dec. No. 223 (1982).
9. *Delano Jt. Union High Sch. Dist.*, PERB Dec. No. 307 (1983); *See also Santee Elem. Sch. Dist.*, PERB Dec. No. 1822 (2006) (although union held to have waived its right to negotiate adoption of board policy, it did not waive right to negotiate impact of board policy after its adoption where policy not immediately implemented, policy indicated that Superintendent would develop a written plan to implement the policy, and policy stated that to the extent the policy modified existing contractual provisions employee organizations would be given an opportunity to bargain).
10. *Morgan Hill Unified Sch. Dist.*, PERB Dec. No. 554a (1985)
11. *See Compton Community College Dist.*, PERB Dec. No. 720 (1989)
12. *Calexico Unified Sch. Dist.*, PERB Dec. No. 357 (1983); *Compton Community College Dist., supra.*
13. *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 23 Cal. 3d 296 (1979); *San Mateo Community College Dist.*, PERB Dec. No. 94 (1979); *San Francisco Community College Dist.*, PERB Dec. No. 105 (1979).
14. *See Calexico Unified Sch. Dist.*, PERB Dec. No. 357*; San Mateo Community College Dist.*, PERB Dec. No. 394*; San Francisco Community College Dist.*, PERB Dec. No. 105.
15. *Sonoma County Org. of Pub. Employees v. County of Sonoma, supra.*
16. *Mt. Diablo Unified Sch. Dist.*, PERB Dec. No. 373 (1983).
17. California State Employees Assn. v. Public Employment Relations Bd., 51 Cal. App. 4th 923, 936 (1996); *San Mateo Community College Dist., supra*; *San Joaquin County Employees Assn. v. City of Stockton*, 161 Cal. App. 3d 813, 818-819 (1984); *NLRB v. Katz*, 369 U.S. 736; *Hinson v. NLRB*, 428 F. 2d 133, 136 (8th Cir. 1970); *NLRB v. Cone Mills Corp.*, 373 F. 2d 595, 598-599 (4th Cir. 1967).
18. *NLRB v. Haberman Constr. Co.*, 618 F. 2d 288 (5th Cir 1980), affirmed on rehearing 641 F. 2d 351 (5th Cir 1981); *see also Industrial Union of Marine & Shipbuilding Workers Union*, 320 F. 2d 618 (1963). The Dills Act, however,

which covers State employees, explicitly provides that the provisions of a memorandum of understanding will remain in effect unless and until a new agreement is reached or the parties reach an impasse (Cal. Gov't Code § 3517.8).

19. *See e.g., California Dept. of Youth Authority*, PERB Dec. No. 962-S (1992); Antelope Valley Union High School Dist., supra; Rowland Unified Sch. Dist., PERB Dec. No. 1053 (1994).
20. *Litton Financial Div. v. NLRB*, 501 U.S. 190 (1991)
21. Cal. Gov't Code § 3517.8
22. *Eureka City Sch. Dist.*, PERB Dec. No. 955 (1992). *See also City and County of San Francisco*, PERB Dec. No. 1608-M (2004) (changes in duties reasonably related to existing duties). In the *Eureka* case PERB found that a smoking policy was not within the scope of representation, largely because of legislative mandates regarding the desire to eliminate smoking on school campuses. The same holding may not apply to other jurisdictions.
23. *See Placentia Fire Fighters v. City of Placentia*, 57 Cal. App. 3d 9 (1976); *County of Riverside*, PERB Dec. No. 1715-M (2004); *Oakland Unified Sch. Dist.*, PERB Dec. No. 275 (1982)
24. The Meyers-Milias-Brown Act is codified at Cal. Gov't Code § 3500 et seq.
25. *See* Cal. Gov't Code § 3518.
26. Cal. Gov't Code § 71634.4 (TCEPGA); Cal. Gov't Code § 71820 (TCIELRA)
27. Cal. Gov't Code § 3540 et seq.
28. Cal. Gov't Code § 3540.1(f). See also Cal. Gov't Code § 3562(j) (HEERA)
29. Cal. Code Regs., tit. 8 § 32793.
30. Cal. Gov't Code § 3543.5(e) (EERA); Cal. Gov't Code § 3571(e) (HEERA). *See also Temple City Unified Sch. Dist.*, PERB Dec. No. 841 (1990) (overruled in part by *Charter Oak Unified Sch. Dist.*, PERB Dec. No. 873 (1991)).
31. *See Modesto City Schools*, PERB Dec. No. 291 (1983)
32. *Id.*
33. Cal. Gov't Code §§ 3517, 3519(e)
34. Cal. Code Regs., tit. 8 § 32696(e) (TCEPGA); Cal. Code Regs., tit. 8 § 32608(e) (TCIELRA)
35. Mediation may be permissive or mandatory—more often it's permissive. Interest arbitration is contained in the local agency's charter. Cal. Code Civ. Proc. § 1299 et seq. (SB 402, SB 442) requires local agencies to take police and firefighter economic disputes to binding interest arbitration. SB 402, passed in 2000, was declared unconstitutional by the California Supreme Court in *County of Riverside v. Superior Court*, 30 Cal. 4th 278 (2003). In 2003, the Legislature passed SB 442, which largely duplicates the provisions of SB 402. The constitutionality of this statute is also being litigated.
36. Cal. Code Regs., tit. 8 § 32603(e)
37. *Public Employment Relations Bd. v. Modesto City Sch. Dist., supra*, 136 Cal. App. 3d at 900-901 (citing private sector precedent); *Laguna Salada Union Sch. Dist.*, PERB Dec. No. 1103 (1995)
38. Cal. Gov't Code § 3517.8 (SEERA); Cal. Gov't Code § 3505.4
39. *See e.g., Betts v. Board of Admin. of the Pub. Employees' Retirement System* 21 Cal. 3d 859 (1978) (pension benefits); *Olson v. Cory*, 27 Cal. 3d 203 (1980) (pension benefits); *Thorning v. Hollister Sch. Dist.*, 11 Cal.App.4th 1598 (1992) (retiree medical insurance); *Ventura County Retired Employees' Ass'n, Inc. v. County of Ventura*, 228 Cal. App. 3d 1594 (1991) (retiree medical insurance); *Cal. League of City Employee Ass'ns, SEIU Local 660 v. Palos Verdes Library Dist.*, 87 Cal. App. 3d 135 (1978) (longevity pay, vacation and sabbatical leave policies); *San Bernardino Pub. Employees Ass'n v. City of Fontana*, 67 Cal. App. 4th 1215 (1999) (distinguishing Palos Verdes case in matter involving collective bargaining agreement).
40. Cal. Gov't Code § 3543.7 (EERA); Cal. Gov't Code § 3517 (SEERA); Cal. Gov't Code § 3505.4 (MMBA); Cal. Gov't Code §§ 3572, 3572.1, 3572.3 (HEERA)
41. *Public Employment Relations Bd. v. Modesto City Sch. Dist., supra; Rowland Unified Sch. Dist.*, PERB Dec. No. 1053 (1994).

From the Editors

EDITORIAL POLICY

We would like the *Law Review* to reflect the diversity of the Section's membership in the articles and columns we publish. We therefore invite members of the Section and others to submit articles and columns from the points of view of employees, unions, and management. Our resources are you, the reader, so please provide us with the variety of viewpoints representative of nearly 6000 members. In addition, although articles may be written from a particular viewpoint (i.e. management or employee/union), whenever possible, submitted articles should at least address the existence of relevant issues from the other perspective. For example, does the existence of a collective bargaining agreement affect the law on a particular subject? Thank you for all of your high quality submissions to date, and please…keep them coming! Please e-mail your submission to Section Coordinator Edward Bernard at edward.bernard@calbar.ca.gov.

The Review reserves the right to edit articles for reasons of space or for other reasons, to decline to print articles that are submitted, or to invite responses from those with other points of view. We will consult with authors before any significant editing. Authors are responsible for shepardizing and proof reading their submissions. Please follow the style in the most current edition of *The Bluebook: A Uniform System of Citation* and put all citations in endnotes.

Employment Law Notes

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WCAB, 135 Cal. App. 4th 1513 (2006) (no workers' compensation coverage for injuries sustained by off-duty police officer injured while playing pickup basketball); *cf. Kephart v. Genuity, Inc.*, 136 Cal. App. 4th 280 (2006) (employer not vicariously liable for auto accident caused by employee involved in apparent "road rage" incident); *Kinsman v. Unocal Corp.*, 37 Cal. 4th 659 (2005) (landowner may be liable for injuries sustained by employees of independent contractor due to latent or concealed preexisting hazardous condition on the property).

Court Affirms $1.9 Million Verdict In Favor Of Gay Cook Who Suffered Harassment And Retaliation

Hope v. California Youth Authority, 134 Cal. App. 4th 577 (2005)

Bruce Hope worked as a cook for the CYA for approximately five years during which time he was subjected to derogatory remarks on multiple occasions from his supervisor and others in the workplace based upon his sexual orientation. Although Hope complained to other supervisors and co-workers in the workplace about the harassment, it did not cease. When the wards threatened Hope with physical violence, the security officer who was assigned to the kitchen (and who was one of Hope's harassers, having told the wards that Hope thought they were "pretty") did nothing to protect Hope. Hope, who was diagnosed with HIV two months before starting the job, missed work on occasion and eventually developed a bleeding blister in one of his retinas, which led to a permanent loss of vision in one eye. (Hope's doctor told him the blindness was caused by job stress and that it more commonly occurs among doctors and lawyers.) Hope was eventually placed on a medical leave of absence and never returned to work. At trial, the jury awarded Hope $917,014 in economic damages and $1 million in non-economic emotional distress damages. The Court of Appeal affirmed the judgment in Hope's favor, holding that the CYA actually knew of the severe and/or pervasive harassment but failed to take any corrective action in response—or even to properly investigate the allegations.

School Principal Who Reported Budgeting Practices May Have Been A "Whistleblower"

Patten v. Grant Joint Union High School Dist., 134 Cal. App. 4th 1378 (2005)

Colleen Patten, a junior high school principal, "blew the whistle" concerning four "legal violations" that she believed had occurred at her school. After she complained, Patten was notified that she was being transferred to a smaller junior high school for the 2002-03 academic year. Patten's illness with mononucleosis initially prevented her from returning to work during the summer and early fall months of 2002. Eventually, she claimed in October 2002 that she had been forced to quit her job based on the school district's retaliatory conduct toward her in violation of Cal. Lab. Code § 1102.5 (the "whistleblower" statute). The Court of Appeal reversed the summary judgment that had been granted in favor of the school district after determining that Patten had engaged in protected activity when she disclosed to legislative personnel her concerns about the school's alleged unauthorized use of public assets. However, the Court agreed with the trial court that the other matters about which Patten had complained were nothing more than internal personnel matters that did not rise to the level of a legal violation on the part of the district. The Court further held that Patten may have suffered "adverse employment action" when the school district transferred her from an "underperforming school… requiring immediate intervention" to a smaller magnet school where she would not be able to "make her mark" as readily.

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Labor and Employment Law Section—State Bar of California

2006 COMPETITION

For Outstanding Student Papers In the Area of Labor and Employment

The Labor and Employment Law Section of the State Bar of California is pleased to announce its 2006 Competition for Outstanding Student Papers in the Area of Labor and Employment law.

Prizes

First Prize
$3,000, an all-expense paid trip from any California location for the student winner to attend the Section's Annual Fall Meeting, and a one-year student membership in the Labor and Employment Law Section. The first prize paper will be published in the California Labor and Employment Law Review, the Section's journal, which is circulated to labor and employment lawyers statewide.

Second Prize:
$2,000 and a one-year student membership in the Labor and Employment Law Section.

Honorable Mention:
$1,000 and a one-year student membership in the Labor and Employment Law Section.

All eligible law students who enter the writing competition will receive a one-year student membership in the Labor and Employment Law Section. Membership includes a subscription to the California Labor and Employment Law Review as well as a free searchable CD-ROM containing past issues of the Review.

Contest Rules

TOPICS:
Please select one from below:

Under California law, absent an express or implied contract to terminate only for cause, employment is statutorily presumed to be "at will." (See Cal. Lab. Code § 2922.) Should California change this approach by enacting a "just cause" statute?

The Gender Non-Discrimination Act of 2003 amended California's Fair Employment and Housing Act to explicitly include transgender individuals. (See Cal. Gov't Code § 12926(p) and Cal. Pen. Code § 422.56). In Smith v. City of Salem, 378 F. 3d 566 (6th Cir. 2004), a federal court analyzed Title VII of the Civil Rights Act to include protection for transgender people under sex discrimination provisions. Discuss the differences between California and federal protections for transgender individuals who bring employment discrimination claims.

Should an employer be able to use increased compensation (wages) to reimburse an employee for work-related expenses as had been found in Gattuso v. Hart-Hanks Shoppers, Inc., No. S139555 (review granted Feb. 22, 2006) (previously published at 133 Cal. App. 4th 985 (2005)). If so, what is a fair method for determining whether the employee has been fully compensated for his or her expenditures or losses as required by Cal. Lab. Code §§ 2802 and 2804?

Eligibility

To be eligible for consideration, the paper must be written solely by a student enrolled in a California law school at the time he or she writes the paper.

Submission

Submit your paper by e-mail attachment in Word or WordPerfect formats to Section Coordinator Edward Bernard at Edward.Bernard@calbar.ca.gov. Papers must be e-mailed on or before July 1, 2006. Please also attach a cover letter verifying your law school enrollment and authorizing the Section to publish your paper in the California Labor and Employment Law Review if it is declared the winner. Please follow the citation style of The Blue Book: A Uniform System of Citation. Papers should be no longer than 2,500 words.

Judging

The papers will be judged on the quality of legal research, writing and analysis. The decision of the judges is final. Papers must be of publishable quality, and the Section reserves the right not to award any prizes, if, in the sole opinion of the judges, none of the papers is of publishable quality or meet the standards set forth above.

For information about the Labor and Employment Law Section see: www.calbar.org/laborlaw

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Employment Law Notes

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Bank Manager's Age Discrimination Claim Was Not Preempted By The National Bank Act

Kroske v. U.S. Bank Corp., 432 F.3d 976 (9th Cir. 2005)

Kathy Kroske, a former bank manager of U.S. Bank Corp. in Spokane, Washington, alleged her employment was terminated after 25 years based upon her age (51 years old). The Bank contended Kroske had been terminated because her branch failed to meet its daily performance goals. After Kroske filed suit in Washington state court, U.S. Bank removed the action to federal court based on diversity of citizenship. The Ninth Circuit held there was federal court jurisdiction because there was at least $75,000 in controversy based upon Kroske's interrogatory responses about her alleged damages. However, the Court reversed the summary judgment that had been granted in favor of the Bank, holding that Kroske's age discrimination claim was not preempted by the National Bank Act as the district court had held.

Employer Properly Withheld Taxes From Settlement Check

Rivera v. Baker West, Inc., 430 F.3d 1253 (9th Cir. 2005)

Jack Rivera sued his former employer, Baker Concrete Construction, Inc., for race and national origin discrimination and wrongful termination. The matter was settled for "$40,000 less all lawfully required withholdings" during a settlement conference before a magistrate judge. Baker subsequently issued a settlement check in the amount of $25,140, withholding $14,860 for federal and state income tax and FICA contributions. Rivera cashed the check. However, Rivera opposed Baker's motion to dismiss his claims on the ground that Baker had improperly withheld money from the settlement proceeds. The district court granted Baker's motion to dismiss, holding that the settlement amount was lawfully classified as taxable wages since there was no evidence that Rivera had alleged or was being compensated for any personal physical injuries or physical illness. The Ninth Circuit affirmed and further held that awards for back pay under Title VII are subject to income tax withholding.

Employer That Paid Less Than Minimum Wage Was Subject To Penalties

Armenta v. Osmose, Inc., 135 Cal. App. 4th 314 (2005)

Osmose, Inc., which is in the business of maintaining standing wood utility poles for major utility companies, employed union members as employees pursuant to a collective bargaining agreement. In this class action, the employees alleged they were not compensated for various tasks, including travel time in company vehicles, preparing daily paperwork, and maintaining company vehicles. Osmose argued that it had not violated the California minimum wage law because the average hourly pay the employees received exceeded the minimum wage. The employees argued they were entitled to be paid at least the minimum wage for each hour they worked, plus statutory penalties and interest, irrespective of the average hourly rate they received. The Court of Appeal affirmed judgment in favor of the employees, holding that the federal rule permitting averaging is not applicable under California law. The Court also affirmed an award of waiting time penalties (for willful failure to pay the minimum wage) and attorney's fees and costs against Osmose. *Cf. Overton v. Walt Disney Co.*, 136 Cal. App. 4th 263 (2006) (employees who were assigned parking more than one mile from the worksite were not entitled to be paid for time spent on employer-provided shuttles since they were not required to drive to work and take the shuttle).

Pregnant Employee Could Proceed With Discrimination Claims Arising From Layoff

Kelly v. Stamps.com Inc., 135 Cal. App. 4th 1088 (2006)

Megan Kelly was discharged as the vice president of marketing of Stamps.com when she was seven months' pregnant as part of a company-wide reorganization and reduction in force. Within a year of Kelly's hire in October of 1999, the company suffered a precipitous 93 percent reduction in its stock value and, in order to reduce expenses, laid off 240 of its 540 employees. Although Kelly was not terminated during the October 2000 RIF (in fact, she was given stock options and paid a retention bonus to induce her to remain employed), she was ultimately terminated by different decision-makers in February 2001 along with 150 other employees. The trial court granted the employer's motion for summary judgment, but the Court of Appeal reversed, holding that Kelly had established that the legitimate non-discriminatory business reasons offered by Stamps.com (elimination of Kelly's job as part of a restructuring) may have been false and, therefore, could have been pretext for pregnancy discrimination. Among other things, the Court focused on a comment from the company's CEO that Kelly had mentally "checked out" as she was approaching her pregnancy leave date. The Court affirmed dismissal of Kelly's contract claim for the second installment of her retention bonus, but reversed the dismissal of Kelly's statutory and public policy claims for prompt payment of earned wages.

Court Was Not Required To Dismiss Appeal Of Employer That Failed To Post Bond

Progressive Concrete, Inc. v. Parker, 136 Cal. App. 4th 540 (2006)

Ron Parker was employed as a sales coordinator by both Progressive and another company. The Labor Commissioner awarded Parker $133,339.38 in unpaid wages, interest and penalties. Progressive filed a notice of appeal with the San Diego County Superior Court, requesting a de novo hearing of Parker's claims. The trial court stayed execution of the Commissioner's award and ordered Progressive to post an appeal bond by a date certain, which Progressive failed to do in violation of Cal. Lab. Code § 98.2(b). After the trial court refused to dismiss Progressive's appeal for its failure to post a bond, and after a trial de novo, the court entered judgment for Parker in the amount of $75,263.79. Parker appealed. The Court of Appeal affirmed the judgment, holding that the trial court was not required to dismiss Progressive's appeal for its failure to post a bond: "It was incumbent on Parker to seek a court order requiring Progressive to post the undertaking by a certain date." *Cf. Bell v. Farmers Ins. Exchange*, 135 Cal. App. 4th 1138 (2006) (10 percent prejudgment interest rate applied to unpaid overtime compensation).

Cases Pending Before California Supreme Court

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action based upon illegal conduct (e.g., extortion) allegedly engaged in by the defendant in relation to prior litigation, is the plaintiff's action subject to a special motion to strike under the anti-SLAPP statute (Cal. Code Civ. Proc., § 425.16)?

International Federation of Professional Engineers v. Superior Court (Conta Costa Newspapers) 128 Cal. App. 4th 586 (2005). S134253/A108488. Petition for review after denial of writ of mandate. (1) Are the names and salaries of public employees who earn more than $100,000 per year exempt from disclosure under the California Public Records Act (Cal. Gov't Code § 6250 et seq.) pursuant to Cal. Gov't Code § 6254(c)? (2) Is salary information about individually identified peace officers within the definition of confidential "personnel records" under Cal. Pen. Code §§ 832.7 and 832.8, and thus exempt from disclosure under the Public Records Act pursuant to § 6254(k)?

Kibler v. No. Inyo Co. Local Hosp. Dist., 126 Cal. App. 4th 713 (2005) *review granted* 2005 Cal. LEXIS 4596 (2005). S131641/E035085. Petition for review after affirmance of order denying a special motion to strike under Cal. Code Civ. Proc. § 425.16. Is an action arising out of the hospital peer review mandated by Cal. Bus. & Prof. Code § 809(a)(8) subject to a special motion to strike under the anti-SLAPP statute because such review is an "official proceeding" or implicates a public issue or issue of public interest within the meaning of Cal. Code Civ. Proc. § 425.16(e)(2) and (e)(4)? *See also O'Mear v. Palomar-Pomerado Health*, S131874, *infra.*

Lockheed Litigation Cases, 126 Cal. App. 4th 271 (2005), *review granted* 2005 Cal. LEXIS 3888 (2005). S132167/B166347. Petition for review after affirmance of judgment. On a claim of workplace chemical exposure, does Cal. Evid. Code § 801(b) permit a trial court to review the evidence an expert relied upon in reaching his or her conclusions in order to determine whether that evidence provides a reasonable basis for the expert's opinion?

Lonicki v. Sutter Health Central, 124 Cal. App. 4th 1139 (2004), *review granted* 2005 Cal. LEXIS 2778 (2005). S130839/C039617. Petition for review after affirmance of judgment. (1) Under the provisions of the Moore-Brown-Roberti Family Rights Act (Cal. Gov't Code § 12945.2) that grant an employee the right to a leave of absence when the employee has a serious health condition that makes the employee "unable to perform the functions of the position of that employee," is an employee entitled to a leave of absence where the employee's serious health condition prevents him or her from working for a specific employer, but the employee is able to perform a similar job for a different employer? (2) Did defendant's failure to invoke the statutory procedure for contesting the medical certificate presented by plaintiff preclude it from later contesting the validity of that certificate?

Lyle v. Warner Brothers Television Productions, 117 Cal. App. 4th 1164 (2004), *review granted*, 2004 D.A.R. 8889 (2004). S125171/B160528. Petition for review after affirmance in part and reversal in part of judgment. (1) Can the use of sexually coarse and vulgar language in the workplace constitute harassment based on sex within the meaning of the Fair Employment & Housing Act (FEHA) (Cal. Gov't Code § 12900 et seq.)? (2) Does the potential imposition of liability under FEHA for sexual harassment based on such speech infringe on defendants' rights of free speech under the First Amendment or the state Constitution? Cause argued and submitted February 14, 2006.

May v. Trustees of the California State University, decision without published opinion (2005) *review granted*, 2005 Cal. LEXIS 5971 (2005). S132946/H024624. Petition for review after affirmance of order for a new trial. Briefing deferred pending decision in *Oakland Raiders Football Club v. National Football League*, S132814, which presents the following issue: If the trial court fails to specify its reasons for granting a new trial (Cal. Code Civ. Proc. § 657), is the trial court's order granting a new trial reviewed on appeal under the abuse of discretion standard or is the order subject to independent review?

Miklosky v. U.C. Regents, decision without published opinion (2005), *review granted*, 2006 Cal. LEXIS 6 (2006). S139133/A107711. Petition for review after affirmance sustaining demurrer. Does the requirement of the Whistleblower Protection Act (Cal. Gov't Code §§ 8547-8547.12) that an employee of the University of California have "filed a complaint with the [designated] university officer" and that the university have "failed to reach a decision regarding that complaint within [specified] time limits" before an action for damages can be brought (§ 8547.10(c)) merely require the exhaustion of the internal remedy as a condition of bringing the action, or does it bar an action for damages if the university timely renders any decision on the complaint?

Moran v. Murtaugh Miller Meyer & Nelson, decision without published opinion (2005), *review granted*, 2005 Cal. LEXIS 5385 (2005). S132191/G033102. Petition for review after affirmance of judgment. In assessing whether a vexatious litigant has failed to demonstrate a reasonable probability of success on his or her claim and should be ordered to furnish security before proceeding (Cal. Code Civ. Proc. § 391.3), is the trial court permitted to weigh the plaintiff's evidence, or must the court assume as true all facts alleged in the complaint and determine only whether the plaintiff's claim is foreclosed as a matter of law?

Murphy v. Kenenth Cole Productions, 134 Cal. App. 4th 728 (2005) *review granted* 2006 Cal. LEXIS 2547 (2006). S140308/A107219, A108346. Petition for review after affirmance in part and reversal in part of judgment. (1) Is a claim

under Cal. Lab. Code § 226.7 for the required payment of "one additional hour of pay at the employee's regular rate of compensation" for each day that an employer fails to provide mandatory meal or rest periods to an employee (see Cal. Code Regs., tit. 8, § 11010(11)(D), 12(B)) governed by the three-year statute of limitations for a claim for compensation (Cal. Code Civ. Proc. § 338) or the one-year statute of limitations for a claim for payment of a penalty (Cal. Code Civ. Proc. § 340)? (2) When an employee obtains an award on such a wage claim in administrative proceedings and the employer seeks de novo review in superior court, can the employee pursue additional wage claims not presented in the administrative proceedings?

O'Meara v. Palomar-Pomerado Health, 125 Cal. App. 4th 1324 (2005) *review granted* 2005 Cal. LEXIS 4600 (2005). S131874/D043099. Petition for review after affirmance of order granting a special motion to strike under Cal. Code Civ. Proc. § 425.16. Is an action arising out of the hospital peer review mandated by Business and Professions Code section 809, subdivision (a)(8), subject to a special motion to strike under the anti-SLAPP statute because such review is an "official proceeding" or implicates a public issue or issue of public interest within the meaning of Cal. Code Civ. Proc. § 425.16(e)(2) and (e)(4)? Deferred pending consideration and disposition of a related issue in *Kibler v. No. Inyo Co. Local Hosp. Dist.*, S131641, *supra*.

Prachasaisoradej v. Ralphs Grocery, 122 Cal. App. 4th 29 (2004), *review granted*, 2004 D.A.R. 14910 (2004). S128576/B165498, B168668. Petition for review reversal in judgment. Does an employee bonus plan based on a profit figure that is reduced by a store's expenses, including the cost of workers compensation insurance and cash and inventory losses, violate (a) Cal. Bus. & Prof. Code § 17200, (b) Cal. Cal. Lab. Code §§ 221, 400-410, or 3751, or (c) Cal. Code. Regs. tit. 8, § 11070?

Ross v. Ragingwire, 132 Cal. App. 4th 590 (2005), *review granted*, 2005 Cal. LEXIS 13284 (2005). S138130/C043392. Petition for review after affirmance of judgment. When a person who is authorized to use marijuana for medical purposes under the California Compassionate Use Act (Cal. Health & Saf. Code§ 11362.5) is discharged from employment on the basis of his or her off-duty use of marijuana, does the employee have either a claim under the Fair Employment and Housing Act (Cal. Gov. Code § 12900 et seq.) for unlawful discrimination in employment on the basis of disability or a common law tort claim for wrongful termination in violation of public policy?

Sacramento Police Officers Association v. City of Sacramento, 117 Cal. App. 4th 1289 (2004), *review granted*, 16 Cal. Rptr. 3d 625 (2004). S124395/C042493, C043377. Petition for review after reversal in judgment in action for writ of administrative mandate. Briefing deferred pending decision in *Claremont Police Officers Assn. v. City of Claremont*, S120546, *supra*. Under what circumstances, if any, does a public agency's duty under the Meyers-Milias-Brown Act (Cal. Gov't Code § 3500 et seq.) to meet and confer with a recognized employee organization before making changes to working conditions apply to actions implementing a fundamental management or policy decision where the adoption of that decision was exempt under Cal. Gov't Code § 3504?

San Francisco Fire Fighters v. City & Co. of San Francisco, 125 Cal. App. 4th 1307 (2005), *review granted* 2005 Cal. LEXIS 4595 (2005). S131818/A104822. Petition for review after reversal and remand with directions to issue a writ of mandate requiring the submission of the firefighter promotional certification rule to binding arbitration. Was the finding by the city's civil service commission that a proposed promotional system was necessary to ensure compliance with anti-discrimination laws, and therefore exempt from the otherwise applicable requirement of the city charter that changes in terms and conditions of firefighter employment be submitted to binding arbitration after the parties reached an impasse in bargaining, subject to judicial review under an abuse of discretion standard, or was that determination subject to de novo review by the trial court? Case ordered on calendar March 7, 2006, San Francisco.

Siebel v. Mittlesteadt, 118 Cal. App. 4th 406 (2004), *review granted*, 12 Cal. Rptr. 3d 906 (2004). S125590/H025069. Petition for review after reversal in judgment. Where a post-judgment settlement agreement (1) revises a damages award, (2) provides for the parties to withdraw their appeals but does not provide for an amended judgment, and (3) expressly preserves the defendant's right to bring a malicious prosecution action, does the settlement agreement preclude a finding that the initial action was "favorably terminated" (in defendant's favor) for purposes of the defendant's subsequent malicious prosecution action?

Smith v. Superior Court (L'Oreal USA), 123 Cal. App. 4th 128 (2004), *review granted*, 2005 Cal. LEXIS 567 (2005). Petition following denial of petition for writ of mandate challenging grant of summary adjudication. S129476/B176918. Where an employee's employment terminates upon the completion of an agreed-upon period of employment or a specific task, has the employee been "discharged" within the meaning of Cal. Lab. Code § 201 such that "the wages earned and unpaid at the time of discharge are due and payable immediately"?

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the workplace was irrelevant because "[t]here is no evidence that the Union considered favoritism an issue; it was not addressed in the union campaign. Moreover, a mere consistency between an employee's personal interest and the union's interest is insufficient to establish union activity."

Applying the same reasoning, the Board determined that Banos' complaints were not protected concerted activity. Once again, the Board ruled that Banos was "speaking only for himself" and "there is no evidence that Banos was raising this issue on behalf of his co-workers, or that his coworkers even shared Banos' belief that [his supervisor] displayed such favoritism." In a footnote, the majority also discounted Banos' prior letter to management complaining that his supervisor was "playing favorites" and stating that "other employees agreed." The majority distinguished this reference to common employee concerns because only Banos signed the letter, it was not on union letterhead, and Banos did not sign the letter in his capacity as a shop steward. Finally, the Board announced that the mere presence of a second Union Steward as a witness under *Weingarten* was irrelevant where the Union Steward said nothing during the meeting.

In dissent, Member Liebman disputed the majority's unwillingness to find that issues such as favoritism and fair treatment for employees are a fundamental concern of organized labor. According to Member Liebman, whether the Union previously raised questions of favoritism is irrelevant because the "concept of fair treatment underlies . . . much of what any labor organization typically seeks for its employees." As a result, Banos was inherently engaged in union activity when he grieved about his supervisor's past favoritism.

Member Liebman was particularly concerned by the majority's determination that there was no protected concerted activity. After all, just over one year prior, the Board (again over Member Liebman's dissent) held that an employee's *external complaint* for sexual harassment was not protected concerted activity, but *internal complaints* could still form "the basis for Section 7 protection." *See Holling Press*, 343 NLRB No. 838 (2004).

Absent An Explicit Showing Of Union Animus Employer's May Terminate Employees For Any Reason.

Neptco, Inc., 346 NLRB No. 6 (December 13, 2005).

In Neptco, Inc., Chairman Battista and Member Schaumber reversed the ALJ's finding that Neptco violated § 8(a)(3) and (1) by discharging employees Donald Parnell and Alesa Tingler because of their union activities, and dismissed the complaint in its entirety. Specifically, the Board found that the General Counsel failed to satisfy its initial *Wright Line* burden by demonstrating a prima facie case that the discharges of Parnell and Tingler were motivated by union animus.

In reaching its conclusion, the Board relied on two decisions from the Fifth Circuit for the proposition that "absent a showing of anti-union motivation, an employer may discharge an employee for good reason, a bad reason, or no reason at all without running afoul of the labor laws." Both Fifth Circuit cases, however, dealt with employee misconduct which was objectively egregious and offensive. *See e.g., Midwest Regional Joint Board v. NLRB*, 564 F. 2d 434, 440 (5th Cir. 1977) (no violation where employee's only evidence of pro-union support was his signature on a union authorization card and he was terminated after first receiving three counseling sessions to stop using his bare hand to feed an extruder and ultimately lost a finger); *Mueller Glass Co., v. NLRB*, 544 F.2d 815, 819 (5th Cir. 1977) (refusing to reinstate union organizer who was terminated after engaging in overt sexual harassment of a co-worker which was " vulgar and offensive by any standard of decency."). As explained below, the facts in *Neptco* could have been easily distinguished from these court cases. Nevertheless, a majority of the Board relied upon the Fifth Circuit's decisions that absent express union animus by an employer, no violation occurs when pro-union employees are terminated for minor offenses.

The facts in *Neptco* are relatively straightforward. From May 1999 through August 1999, a union organizing drive was underway at Neptco's facility. Parnell and Tingler were active supporters of the union. In early January 2000, after the organizing drive was essentially abandoned, a Neptco supervisor announced they had a list of employees and they were "cleaning house." Subsequently, on January 26, 2000, Parnell was observed gathering supplies in the warehouse area and was instructed that he should not have left his machine. Later that same day, Parnell and Tingler were seen talking together away from their machines. Their supervisor had to ask them twice to return to their machines. Rather than immediately returning to her machine, Tingler went to the restroom for approximately 20 minutes. The next day both Parnell and Tingler were told that they were being terminated for poor "job performance." For the first time at the hearing, the employer claimed the terminations were based on "insubordination" (a more serious offense under Neptco's progressive discipline policy).

The ALJ (and Member Liebman, dissenting), noted that Neptco had a progressive discipline policy and that the events of January 26th were Parnell and Tingler's first disciplinary write-ups. Moreover, the employer admitted that no other employees were terminated for such minor offenses. Finally, the ALJ relied upon inconsistent testimony from Neptco's witnesses to support a showing of anti-union animus. Based on these facts, the ALJ determined that Neptco's asserted reasons for Parnell and Tinger's discharge were false, inferred union animus, and found a violation of 8(a)(1) and 8(a)(3) of the Act.

A majority of the Board disagreed. According to Chairman Battista and Member Schaumber, "the judge's finding of union animus . . . is based exclusively on conjecture." The majority also announced that a supervisor's statement that the company was "cleaning house" was inconclusive because no mention was explicitly made of the union. Further, the Board found nothing suspicious about the timing of the discharges where the union's organizing campaign was effectively over at the time of the termination. Finally, the Board concluded it was irrelevant whether Parnell and Tingler's conduct truly amounted to "insubordination." According to the majority, without concrete evidence of union animus, Neptco retained complete discretion to terminate employees for any or no reason.

Public Sector Case Notes

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employee not of Dominguez's class (i.e. female). If Dominguez could establish these elements, the Department then could present evidence that it had a legitimate business reason for promoting Andrews instead of Dominguez. Dominguez would then have the opportunity to establish that the Department's proffered reason was only a pretext for discrimination.

Here, Dominguez established a prima facie case of discrimination. Moreover, Dominguez presented direct evidence of discrimination, such as Stacey's sexist comments that "he wished he could get men to do [female employees'] jobs." The Ninth Circuit acknowledged that the evidence may lead a jury to conclude that the Department had a legitimate business reason for hiring Andrews over Dominguez. However, the Court also held that a reasonable jury could conclude that the decision not to promote Dominguez was motivated at least in part by his gender.

The Court opined that because both Andrews and Dominguez met the minimum qualifications for the position, summary judgment was improper because there was a factual dispute as to who was the more qualified candidate. Furthermore, the court stated that, "Even if it were uncontested that Andrews' qualifications were superior, this would not preclude a finding of discrimination. An employer may be held liable for discrimination even if it has a legitimate reason for its employment decision, as long as an illegitimate reason was a motivating factor in the decision."

SEXUAL ORIENTATION HARASSMENT

California Court Upholds $1.9 Million Jury Verdict In Favor Of Gay Employee For Harassment.

Hope v. California Youth Authority, 134 Cal. App. 4th 577 (2005)

Please see California Employment Law Notes by Anthony J. Oncidi, *supra.*

DISABILITY DISCRIMINATION

Knight v. Hayward Unified School District, 132 Cal. App. 4th 121 (2005)

School District Employee Whose Wife Was Denied Insurance Coverage For In Vitro Fertilization May Not Bring Claim Under FEHA.

Andrew Knight was a teacher in the Hayward Unified School District. Knight selected insurance coverage for himself and his family under the PacifiCare Health Maintenance Organization plan, one of the insurance plans offered by the District. In 1991, Knight's wife was diagnosed with polycystic ovarian disease. Over the next ten years, Knight and his wife unsuccessfully attempted to conceive. During that time, Knight's wife received various forms of infertility treatment and had several miscarriages. Although the PacifiCare plan covered many forms of infertility treatment, the plan did not cover in vitro fertilization.

Knight filed suit against the District, alleging that he had been the victim of disability discrimination in violation of California's Fair Employment and Housing Act (FEHA). The District moved for summary judgment on Knight's theories of disparate treatment and disparate impact, which was granted by the trial court. The First District Court of Appeal affirmed.

The FEHA prohibits employers from discriminating against individuals in the terms, conditions or privileges of employment because of physical disabilities or medical conditions. Here, the discrimination Knight complains of is not based on infertility because the PacifiCare plan covers many forms of infertility treatment. Instead, Knight claims to be discriminated against because PacifiCare does not offer the particular treatment requested by Knight and his wife. The court rejected Knight's argument, noting that the law does not allow for a cause of action for "treatment-based" discrimination. A distinction in health care plans that have a greater impact on disabled individuals who require a particular form of treatment but not other disabled persons does not constitute disability discrimination. There is no discrimination if disabled individuals are given the same opportunities as everyone else. Thus, insurance distinctions that apply equally to all employees cannot be discriminatory.

REASONABLE ACCOMMODATION

Employer's Duty To Provide Reasonable Accommodation For Disabled Employee Does Not Require The Employer To Convert A Temporary Light-Duty Position Into A Permanent Position Which, In Effect, Would Create A New Position.

Raine v. City of Burbank, 135 Cal. App. 4th 1215 (2006)

Mark Raine had been employed as a police officer for the City of Burbank Police Department since 1981. In 1995, the City re-assigned Raine to work as a school resource officer for the Burbank Unified School District, where he was to patrol school campuses. One week after his reassignment, Raine suffered a torn meniscus while on duty. Following his injury, the City re-assigned Raine to a temporary light-duty position at the front desk to accommodate him while he healed from his injury. Raine remained in this position for six years, until his physician concluded that his disability was permanent. After learning that Raine's disability was permanent, the City told Raine it had no available position for a sworn police officer with Raine's qualifications and limitations. Raine then took disability retirement.

Raine filed suit alleging the City violated his FEHA rights when it removed him from his front desk position. The trial court granted summary judgment in favor of the City and held the City had no duty to make Raine's temporary front desk assignment permanent because that would, in effect, require the City to create a new sworn officer position. The Second District Court of Appeal affirmed.

The FEHA prohibits an employer from discharging an employee because of the employee's disability. The FEHA also requires an employer to make reasonable accommodation for an employee's known physical or mental disabilities unless the accommodation would cause the employer "undue hardship." If an employee cannot be accommodated in his existing position, the employer must make an effort to determine whether another position is available. However, the FEHA does not require an employer to reassign an employee if there is no available vacant position. Following this reasoning, and borrowing from Ninth Circuit authority, the Court held that the FEHA does not require an employer to transform a temporary light-duty assignment into a permanent assignment to accommodate a disabled employee.

Here, the City's police department front desk position was permanently staffed by civilian employees called "police technicians" who are paid less and provided fewer benefits than sworn police officers. The City also uses the front desk assignment as a temporary light-duty assignment for sworn officers who are recovering from injuries. When the City learned that Raine's disability was permanent, it offered him a job as a police technician, but Raine refused the offer because he did not want to forfeit his police retirement benefits.

RACE DISCRIMINATION

Caucasian Members of Police Department Established Claims Of Retaliation And Discrimination By African-American Chief Of Police

Horsford v. Board of Trustees of California State University, 132 Cal. App. 4th 359 (2005)

Steven King, a Caucasian, was a lieutenant in the police department at California State University, Fresno. When the chief of police retired, King applied for the position of chief. Instead of King, Willie Shell, an African-American, was selected for the position. After Shell began, he removed King from the chain of command and later reassigned King to a non-law enforcement position outside the department. As King was prepared to move, he overheard Shell comment to an African-American police officer that he was "moving those white boys out of here." King later resigned from his position.

Richard Snow, a Caucasian, was a sergeant at the University's police department. When King was not selected for the chief of police position, Snow was overtly disappointed. Shell believed that Snow resented the fact an African-American had been appointed. Shell frequently asked another African-American police officer to report if Snow did anything that appeared to be racist, but the officer repeatedly said that she never observed any such behavior. On one occasion, Snow stopped a car on campus and confiscated a six-pack of beer. In his report, Snow documented the specific details of the time, date and method of disposing of the six-pack. However, when Snow's police vehicle was inspected, another officer discovered the six-pack in the truck. Snow was suspended with pay for two weeks for falsifying the report. In contrast, an African-American officer who lost a small quantity of marijuana after seizing it during a stop was not disciplined.

Daniel Horsford, a Caucasian, was an investigator for the University's police department. One of his duties involved reviewing police reports and presenting the qualifying reports to the district attorney. Shortly after Shell arrived, a female officer was flagged down by a 17-year-old girl who reported that a prominent University football player, Michael Pittman, had struck her. She asked the officer to intervene. When the female officer went to Pittman's dormitory, Pittman was belligerent and the officer believed that had she arrested Pittman, a physical altercation would have ensued. The officer completed a report and recommended that the case be referred to the district attorney for prosecution. The following day, Horsford reviewed the report and agreed. However, Shell told Horsford that he was not to go to the district attorney and a case wasn't going to get filed just because an officer "got her feelings hurt." A few months later, Horsford was reassigned to the position of dormitory officer. Horsford was upset and told another officer that he "didn't know what [he] might do." The comment was relayed to Shell, who placed Horsford on administrative leave and required Horsford to submit to two psychological evaluations before returning to work. Horsford eventually resigned.

King, Snow and Horsford filed an action for race discrimination, retaliation and constructive discharge. A jury returned a verdict in favor of each of the plaintiffs and awarded over a million dollars to each. The trial court reduced the damages. Nevertheless, the University appealed, arguing the plaintiffs did not suffer an "adverse employment action" and did not present substantial evidence that the actions taken against them were due to race.

The Fifth District upheld the jury's verdict. Under the FEHA, an adverse employment action is generally one which affects the terms, conditions or privileges of employment. Moreover, a jury may look to the treatment of an employee as a whole. "There is no requirement that the employer's discriminatory acts constitute one swift blow, rather than a series of subtle, yet damaging injuries."

With respect to the University's argument that the plaintiffs did not present substantial evidence of discrimination, the Court concluded that the University was placing a more hefty burden of proof than required. In an employment discrimination case, "a plaintiff's burden is to produce evidence that, taken as a whole, permits a rational inference that intentional discrimination was a substantial motivating factor in the employer's actions toward the plaintiff." Circumstantial evidence of motivation is not speculative evidence simply because it requires the jury to make inferences. Here, the men presented substantial evidence that would allow a jury to infer that the actions taken against the men were because of their race.

FAIR LABOR STANDARDS ACT

City Is Required To Pay Police Dispatcher For Time Spent Traveling To Counseling Sessions Ordered By City.

Sehie v. City of Aurora, 432 F.3d 749 (7th Cir. 2005)

The Seventh Circuit Court of Appeals affirmed a federal district court decision in Illinois held that a City was required to pay an employee for time spent traveling to counseling sessions ordered by the City.

Kari Sehie worked as an emergency dispatcher for the City of Aurora. One day, at the end of Sehie's eight-hour work shift, her superiors instructed her to stay and work another shift because her co-worker was ill. Sehie became very angry and, less than an hour into the second shift, Sehie abruptly left work. Sehie remained off work for several days, during which time she went to her personal therapist and took medication for stress. When she returned to work, she reported the absence as a work-related injury.

The City required Sehie to submit to a fitness for duty examination before returning to work. Following the examination, Sehie was deemed fit for duty. However, the physician recommended that she attend weekly psychotherapy for six months. Sehie attended the mandatory hour-long counseling sessions and spent two hours traveling to and from the sessions. The City did not pay Sehie for her travel time.

Sehie filed suit alleging the City violated her rights under the Fair Labor Standards Act when it did not properly compensate her for her time spent traveling to the mandatory counseling sessions. The district court ruled in favor of Sehie and the Seventh Circuit affirmed.

The FLSA requires employers to compensate employees for all hours worked in excess of forty hours per week at the rate of one and one-half time the employee's regular rate of compensation, subject to certain exemptions. As a general rule, employees must be paid for all time an employee spends in "physical or mental exertion" for the primary benefit of the employer.

The City required Sehie to attend counseling sessions to enable her to perform her job duties and relate to her coworkers more effectively. Therefore, even though the counseling sessions also benefited Sehie, they were for the primary benefit of the City. Because Sehie's attendance at the sessions was mandatory, the City was required to compensate her for the time she spent traveling to and from the sessions.

LABOR RELATIONS

PERB Rejects Board Agent's Conclusion That Unfair Practice Charge Filed By County Was Without Merit Where County's Charges Clearly Demonstrated That Union Failed To Bargain In Good Faith.

County of Inyo, PERB Decision No. 1783-M (2005)

The County of Inyo filed an unfair practice charge against the United Domestic Workers of America, alleging the union violated the Meyers-Milias-Brown Act (MMBA) when it failed to negotiate in good faith. Accompanying its charge, the County included evidence of numerous occasions where its attempts to negotiate in good faith were rebuffed by the union. Nevertheless, the board agent for the Public Employment Relations dismissed the charge on the grounds that the County had not included sufficient evidence in support of its charge. On appeal, the PERB reversed the board agent's decision.

While a party bringing an unfair practice charge is required to present the "who, what, when, where and how" underlying the allegations, the party need not include all of its evidence or theories of law in the charge. Here, the County's charge included sufficient information to demonstrate that the union had failed to negotiate in good faith. Therefore, PERB ruled, the board agent improperly dismissed the County's charge.

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