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MCLE Self-Study

THE EMPLOYMENT LAWYER'S GUIDE TO CALIFORNIA ANTI-SLAPP LAW

By Benjamin G. Shatz and Cameron Fredman

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It seems like hardly a day passes without a California court issuing a decision involving the state's anti-SLAPP statutes.[1] Commentators call it an "explosion" that "clog[s] our courts."[2] The anti-SLAPP statutes have evolved from relative obscurity to a powerful weapon in the defendant's arsenal, like a summary judgment motion—but without the 75-day notice period, without discovery, and with the potential for attorneys' fees. This article addresses the origins and operation of the statutes and then turns to some unique situations presented by anti-SLAPP in the employment context.

ANTI-SLAPP'S ORIGINS[3]

Nearly twenty years ago, in 1988 two sociologists published an article, *Strategic Lawsuits Against Public Participation,*[4] discussing how powerful private interests use civil litigation to stifle and deter political expression by common citizens. For instance, "[t]he paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans."[5] In other words, a SLAPP action is filed not to vindicate the plaintiff's rights or seek redress, but rather to interfere with the defendant's First Amendment rights. A substantive lack of merit is a hallmark of SLAPP suits—the plaintiffs care less about winning on the merits and more about intimidating an opponent and tying up their resources.

The favored causes of action in SLAPP suits should sound familiar to employment litigators: defamation, interference with prospective economic advantage, nuisance, and intentional infliction of emotional distress.[6]

CALIFORNIA'S ANTI-SLAPP ENACTMENT & AMENDMENTS

The sociologists' article struck a nerve, and soon anti-SLAPP legislation passed in states nationwide. California's anti-SLAPP statute, Code of Civil Procedure section 425.16, took effect in 1993 and begins with an explanatory policy statement: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[7] As one court put it, "the point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights."[8]

The meat of the statute provides that [a] cause of action against a person arising from any act of that

continued on page 30

— *Inside the Review* —

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The NLRB and California Supreme Court Provide Important Guidance Concerning Interplay Between Property and Speech Rights[1]

By Jeffrey S. Bosley and Nicole Friedenberg

Jeffrey S. Bosley is a partner with the Labor and Employment Department of Winston & Strawn LLP, and argued *Guard Publishing* before the National Labor Relations Board on behalf of the Employers Group. Nicole Friedenberg is an associate in the Labor and Employment Group of Winston & Strawn LLP, and recently completed a clerkship with the Hon. Patricia A. Seitz, United States District Court for the Southern District of Florida.

In three significant recent cases, the National Labor Relations Board (Board) and the California Supreme Court have examined the interplay between property rights and the rights of employees and unions to engage in organizing activity and other communications. These cases have been hotly contested, and the two resulting decisions closely divided. While one of these cases remains pending, the rare oral argument conducted by the Board in that case indicates that it, too, could be a closely divided opinion.

This article describes the cases, and the guidance they provide on several key issues, which include: How much control does a private property owner actually have over its property? To what extent can employees exercise their Section 7 rights on, or using, their employer's property? Can employees or union representatives enter private property to seek assistance with their labor disputes from customers and clients? While the full impact of these cases will be debated for some time, they provide some important and long awaited guidance to practitioners on these issues.

E-MAIL SOLICITATION USING EMPLOYER PROPERTY: THE *GUARD PUBLISHING* CASE

On December 16, 2007, a sharply divided Board[2] upheld a private employer's e-mail policy prohibiting non-job-related solicitations, including union solicitations. In finding that employees have no statutory right to use their employer's e-mail system to engage in "Section 7 communications," the Board likened e-mail systems to other employer-owned communications systems such as bulletin boards and telephones, whose use can be restricted if done in a non-discriminatory manner.[3] The Board also announced a new standard for determining when an employer is applying a solicitation policy in a discriminatory manner.

On three occasions in 2000, Guard Publishing (which publishes the Register-Guard newspaper) reprimanded its employee and president of the Eugene Newspaper Guild (Guild), Suzi Prozanski, for using its premises and its e-mail system to communicate with Guild members.[4] On May 4, 2000, Prozanski used a company computer and the company system to send an e-mail to Guild members "clarifying" an issue concerning a union rally the previous day.[5] On August 14, 2000, she used a Guild computer to send an e-mail through the company's system to Guild members, requesting that they wear green in support of the union's position in negotiations.[6] Four days later, she sent another e-mail from a Guild computer through the company's system, seeking help with the union's entry in an upcoming parade.[7] In disciplining Prozanski for sending these e-mails, Guard Publishing relied on the following policy:

> Company communication systems and the equipment used to operate the communication systems are owned and provided by the company to assist in conducting the business of the Register Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, or religious or political causes, outside organizations, or other non-job-related communications.[8]

The Board held that Guard Publishing did not violate the National Labor Relations Act (Act) by reprimanding Prozanski with respect to her two August 2000 e-mails, but did with respect to her May 2000 e-mail because it was not a solicitation for an outside group.[9] Although the record demonstrated that Guard Publishing was aware employees had used its e-mail system to send and receive personal messages including baby announcements, party invitations, and services like dog-walking, there was no evidence that employees used the company system to solicit support for any outside organization.[10] This evidence was key to the Board's articulation of its new standard concerning discrimination. This standard focuses on whether there has been "unequal treatment of equals." The Board stated: "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status."[11]

The Board's new rule rejects the notion that, once an employer allows *any* type of non-work communication, it must allow *all* types of non-work communications. Under the new standard, an employer that allows employees to send personal e-mail messages about social gatherings, but prohibits them from sending e-mails soliciting support for an outside organization, can also prohibit solicitations in support of a labor organization.[12] Thus, because Prozanski's May 2000 e-mail was not a call to action, but merely clarified the facts surrounding a union rally, it did not violate Guard Publishing's solicitation policy.[13]

Notably, the Board distinguished the standard articulated in the United States Supreme Court's decision in *Republic Aviation Corp. v. NLRB*.[14] As a matter of first impression, the Board held that *Republic Aviation* did not apply to accessing employer-owned e-mail systems, as that case only involved face-to-face communications.[15] In *Republic Aviation,* the Supreme Court and the Board agreed that banning all solicitation during non-working time was unlawful, and required an employer "to yield its property interests to the extent necessary to ensure that employees will not be entirely deprived of their ability to engage in Section 7 communications in the workplace on their own time."[16] But, the Guard Publishing policy did not in any way regulate employees' rights to engage in traditional oral solicitation and distribution of liter-

continued on page 13

A Matter of Logic—California Supreme Court Says a Plaintiff Must Show Ability to Perform Essential Duties in *Green v. State of California*

By Michelle Logan-Stern

Michelle Logan-Stern is a Deputy Attorney General practicing employment law at the California Department of Justice. Ms. Logan-Stern served as trial counsel in the *Green* matter and handled all post-trial and appellate work in the case. Ms. Logan-Stern represents State departments and agencies in all facets of state and federal employment law, including counseling, litigation, and appeals.

Though appearing to be well settled by case law, the elements of a claim for disability discrimination became hotly contested when a San Bernardino County trial court accepted jury instructions predicated upon California regulations instead of judicial precedent. This decision relieved the plaintiff of the burden of proving his ability to perform his job. It established the inability to perform as an affirmative defense. This was the situation in *Green v. State of California*,[1] recently decided by the California Supreme Court in a split opinion that diverged primarily based on a matter of logic.

In *Green,* the trial court gave the applicable BAJI[2] jury instructions on the discrimination cause of action, which did not include ability to perform the essential duties of the job as part of the plaintiff's burden of proof. The instructions, based on California regulations predating much of the applicable case law, presented the inability to perform as an affirmative defense. As the case law construed the ability to perform as an essential element of the plaintiff's claim, the trial illuminated a split of opinion regarding which party bore the burden of proof on the ability to perform.

On August 23, 2007, the supreme court settled the issue. It noted that a plaintiff bears the burden of proving all elements essential to a claim. It determined that the essential elements of a disability discrimination claim included the plaintiff's ability to perform essential job duties with or without reasonable accommodation. Based on this rationale, the California Supreme Court held that a plaintiff must prove he or she can perform the essential duties of a position with or without reasonable accommodation.

CASE BACKGROUND

Plaintiff, Dwight D. Green, worked as a stationary engineer for the Department of Corrections at the California Institute for Men (Department). Green's duties included maintenance and repair of large equipment and mechanical systems, and supervision and instruction of a crew of inmates.

Around 1990, Green was diagnosed with hepatitis C.[3] Though he had otherwise functioned normally at work, interferon treatment for his condition caused Green to feel fatigued, to have trouble sleeping, and to suffer headaches and body aches. At times, he was restricted to light duty due to the effects of the interferon treatments.

In July 2000, Green was told that based on unresolved work restrictions imposed by a "Qualified Medical Examiner" in the course of his related worker's compensation proceedings, he was prohibited from performing some essential duties of his position and could not return to work without full clearance from those restrictions. Green did not obtain clearance from the restrictions and took a disability retirement.

Green subsequently filed an administrative claim with the Department of Fair Employment and Housing, alleging disability discrimination and failure to accommodate. He then filed a complaint for damages in the superior court based on the same claims.

At trial, the Department stipulated that Green was disabled based on the restrictions caused by his hepatitis C. It also submitted a special jury instruction based on *Brundage v. Hahn*[4] and proposed CACI instruction No. 2540,[5] which required Green to prove he could perform the duties essential to his position. The court rejected the special instruction and approved BAJI No. 12.12 on disability discrimination. To prevail under BAJI No. 12.12, Green had only to show that he suffered harm by the Department and that the harm was motivated by his disability. The jury returned a general verdict for Green, awarding him $2,597,088 in total damages, plus attorneys' fees and costs.

On appeal, the Department raised several bases for a new trial, including a claim that the trial court committed prejudicial error in failing to properly instruct the jury on the elements of a disability discrimination claim under the Fair Employment and Housing Act (FEHA) and the relevant defenses.[6] The court of appeal upheld the trial court's determination that the Department had the burden of proving inability to perform as an affirmative defense. The California Supreme Court granted the Department's petition for review on the issue of which party bore the burden of proof regarding the ability to perform.

THE ELEMENT OF QUALIFICATION

Justice Chin authored the majority opinion for the court. The court acknowledged that until *Green,* courts had unanimously presumed that a plaintiff in a disability discrimination action was required to prove he was "qualified" for a position, and that such proof of qualification was the ability to perform the essential job duties with or without reasonable accommodation. The court then explored the issue of whether this judicial interpretation of Government Code section 12940(a) and (a)(1) was correct.

The court considered the issue of who bore the burden a matter of statutory construction, and in the end found that the statute dictated a clear and unambiguous answer. The first step in the court's analysis was to ascertain and effectuate legislative intent. The court looked to the plain language of Government Code section 12940 and compared it to the Americans with Disabilities Act (ADA) provision upon which it was based. The court noted that federal case law interpreting the ADA is clear that an employee bears the burden of proving that he or she meets the definition of a "qualified individual with a disability" in

continued on page 17

Public Sector Case Notes

By Stewart Weinberg

Stewart Weinberg, a 1960 graduate of Boalt Hall, is a partner in Weinberg, Rogers and Rosenfeld in Oakland, a union-side labor firm. Mr. Weinberg specializes in the representation of unions and employees in the public sector.

STATE EMPLOYEES

Collective Bargaining Agreement That Limits the State's Ability to Contract Out Architectural and Engineering Services Conflicts With Proposition 35

Consulting Eng'rs & Land Surveyors of Cal., Inc. v. Prof'l Eng'rs in Ca. Gov't, 42 Ca1. 4th 578 (2007)

This case is another chapter in the ongoing saga of the Professional Engineers in California Government's attempt to overcome the effects of Proposition 35 (Prop 35). Prop 35 was passed by the electorate on November 7, 2000. That initiative had both constitutional and statutory elements. The state constitution, article VII, established the state's civil service system. Prop 35 provided, in part, that nothing in article VII would limit, restrict or prohibit the state or any other governmental entities, including cities, counties and school districts, from contracting with private entities for the performance of architectural and engineering services. Prop 35 also provided that the state of California and all other governmental entities shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement. In *Professional Engineers in California Government v. Kempton (Kempton),* 40 Ca1. 4th 1016 (2007), the California Supreme Court held that Prop 35 removed the constitutional restriction on the ability of state agencies to contract with private firms for architectural and engineering services on public works projects and impliedly repealed certain regulatory statutes pertaining to private contracting. The instant case involved the collective bargaining agreement or memorandum of understanding (MOU) between Professional Engineers in California Government and the state of California. Article 24 of that MOU provided that except in extremely unusual, urgent or time limited circumstances, or where contracting out is recognized or required by law, federal mandate or court decisions, the state must make every effort to hire, utilize and retain state bargaining Unit 9 employees before resorting to the use of private contractors. Article 24 gave the union the ability to present alternatives to contracting out. It also provided that Unit 9 employees would have preference over contract employees and that all existing personal service contracts would be reviewed by a joint labor management committee to determine whether or not work currently contracted out could be assigned to Unit 9 employees.

The supreme court reiterated the point that it made in *Kempton* that the Legislature did not have exclusive authority to establish state policy for private contracting but that such authority was shared with the electorate. The supreme court followed its decision in *Kempton,* noting that the MOU was not and could not amend the initiative. Article 24 of the MOU attempted to revive some of the restrictions on the ability of state agencies to enter into private services, for instance by limiting private contracting to "extremely unusual or urgent" circumstances. The limitations in article 24 which the parties to the MOU attempted to impose on private contracting "reflect the spirit and to some extent the letter of those California Constitution Article VII-derived statutes that we held in *Kempton* had been impliedly repealed by Proposition 35." The supreme court reminded the parties that Proposition 35 applied equally to all three branches of government, and thus the union's attempt to circumvent Proposition 35 by arguing that the MOU located the authority for the restrictions on private contracting in the executive branch rather than the Legislature was ineffective.

PERS CONTRIBUTIONS

Increases in Salary Payments Which Are Not Available to Similarly Situated Employees May Not Be Used to Calculate a Public Employee's Retirement Allowance

Prentice v. Bd. of Admin. Cal. Pub. Employees Ret. Sys., 157 Cal. App. 4th 983 (2007)

The Public Employees Retirement System (PERS) has limitations on the salary which may be considered when calculating a public employee's retirement allowance. Among other things, limitations exclude from consideration payments which are not available to similarly situated public employees. A local municipality increased the salary of the manager of its Water and Power Department by 10.49 percent during the last two years of his career. The salary increase was applicable to anyone who filled the position; however, the salary range of the position was not altered, and thus other employees in the same class or range of that manager would not obtain that increase. Consequently, PERS did not include the salary increase in calculating the manager's retirement allowance. The manager challenged PERS' decision. The court of appeal upheld PERS' refusal to include the increase in its calculations.

California Government Code section 20636 provides that compensation earnable by a member of the system means the pay rate and special compensation of the employee as defined in that section. That section further defines pay rate as the "normal monthly rate of pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours. . . ." The petitioner in this case was a member of the management confidential class of city employees along with

continued on page 19

Employment Law Case Notes

By Anthony J. Oncidi

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San Francisco Health Care Security Ordinance Is Preempted by Federal Law

Golden Gate Rest. Ass'n v. City & County of San Francisco, 2008 WL 90078 (9th Cir. Jan. 9, 2008)

In 2006, the San Francisco Board of Supervisors passed and the Mayor signed into law the San Francisco Health Care Security Ordinance which, among other things, would have required employers with more than twenty employees to make health care expenditures on behalf of their employees. The ordinance was scheduled to go into effect on January 1, 2008. The district court held that the ordinance is preempted by federal law, specifically the Employee Retirement Income Security Act of 1974 (ERISA), and enjoined its implementation. Two weeks later, the Ninth Circuit concluded that the City has a "probability, even a strong likelihood, of success in their argument that the ordinance is not preempted by ERISA" and, therefore, ordered that the district court's judgment be stayed pending resolution of the city's appeal on the merits.

Trial Court Erred in Failing to Certify Broader Wage and Hour Class Action

Bell v. Super. Ct., 158 Cal. App. 4th 147 (2007)

Four employees of H.F. Cox Inc. d/b/a Cox Petroleum Transport filed this wage and hour class action challenging their employer's failure to pay overtime, its requirement of off-the-clock work, its failure to provide meal and rest periods, its incorrect calculation of vacation pay, and its failure to pay pro rata vacation pay upon termination. The trial court granted plaintiffs' motion to certify a class but only with respect to the last category of claims. In response, plaintiffs filed a petition for writ of mandate, which the court of appeal granted, holding that the trial court had erred in failing to certify a class for the overtime pay and the vacation pay calculation claims. The appellate court reasoned that the trial court's determination that individual issues predominated over common ones was not supported by substantial evidence. *Cf. Fireside Bank v. Superior Court,* 40 Cal. 4th 1069 (2007) (trial court erred in ruling on the substantive merits of class action while concurrently certifying the class).

Housekeeper's Award of $70,000 For Unpaid Wages Is Affirmed

Gonzalez v. Beck, 158 Cal. App. 4th 598 (2007)

Josepha Gonzalez worked as a caregiver and housekeeper for the Beck family. Upon the termination of her employment, she filed a claim for unpaid wages with the California Labor Commissioner (Commissioner). When the Becks failed to answer or appear at the administrative hearing, Gonzalez obtained an award of $70,238.54 (including interest and penalties) from the Commissioner upon which judgment was subsequently entered. The Becks' motion to set aside the judgment was denied by the trial court on the ground that they had failed to exhaust their administrative remedies under Labor Code section 98(f), which requires defendants to move to set aside the award before the Commissioner prior to seeking judicial relief from a default. The court of appeal affirmed the judgment. *Cf. McCoy v. Superior Court,* 157 Cal. App. 4th 225 (2007) (claim for waiting-time penalties is subject to one-year rather than four-year statute of limitations).

Employer Could Pay Employees Increased Compensation Rather Than Reimburse Them Separately for Expenses

Gattuso v. Harte-Hanks Shoppers, Inc., 42 Cal. 4th 554 (2007)

Frank Gattuso is an outside sales representative for Harte-Hanks, a California corporation that prepares and distributes advertising booklets and leaflets, including the *PennySaver* and the *California Shopper.* Rather than separately reimburse outside sales representatives for their automobile expenses, Harte-Hanks paid them higher salaries and commissions than it paid its inside sales representatives. Gattuso and Ernest Sigala filed this class action lawsuit, seeking indemnification under Labor Code section 2802 for the expenses they incurred in using their own automobiles to perform their employment duties. The trial court denied the motion to certify the class and determined that the employer had properly indemnified the employees by paying them an increased amount of base salary and commission compensation. The California Supreme Court agreed with the lower courts' ruling in part, holding that "an employer may satisfy its statutory business expense reimbursement obligation under section 2802 by paying employees enhanced compensation . . . provided the employer establishes some means to identify the portion of overall compensation that is intended as expense reimbursement, and provided also that the amounts so identified are sufficient to fully reimburse the employees for all expenses actually and necessarily incurred." However, the supreme court reversed the judgment to the extent it denied class certification on the ground that the lower courts had failed properly to analyze whether common issues predominated. *Cf. Solis v. The Regis Corp.,* 2007 WL 4328806 (N.D. Cal. Dec. 10, 2007) (company violated Labor Code section 212 by paying its subsidiaries' employees with checks drawn from an out-of-state bank).

$1.3 Million Verdict Affirmed in Favor Of Employee Who Was Retaliated Against

Wysinger v. Auto. Club of S. Cal., 157 Cal. App. 4th 413 (2007)

Guy Wysinger, a former district manager for ACSC's Santa Barbara office, filed a complaint with the Equal Employment

continued on page 26

NLRA Case Notes

By Jean Shin

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Board Sets Aside the Election of a Union Due to Polling Irregularities

Columbine Cable Co., Inc., 351 NLRB No. 65 (Nov. 30, 2007)

A majority of a three-member panel set aside a union election after the employer objected to voting irregularities.

The election was held in a multi-purpose room at the employer's facility. Shortly after the polls had closed, two employees arrived and asked to vote. Although the polling period had ended, the ballot boxes had not yet been opened, so the parties agreed to permit the two tardy employees to cast ballots.

Since the voting booth had already been disassembled, the Board agent directed the employees to enter the multi-purpose room one at a time to mark their ballots. The Board agent and election observers stood about fifteen feet away from the employees while they voted, and were able to see their backs and arm movements.

The votes were counted after polling had been closed a second time, revealing a union victory by a seven to six majority, with one void ballot.

The Board set aside the election, noting that it was "of vital importance" that its elections be above reproach. It made clear that the tardy employees should have been afforded privacy and secrecy when they cast their ballots, either in a voting booth or a private room.

Member Walsh dissented, noting that there was no evidence any person saw, or attempted to see, how the employees marked their ballots, and that the employer had not established any reasonable doubt about the fairness or validity of the election. He agreed that the voting conditions in this case were not ideal, but argued that perfect laboratory conditions were seldom attainable. In absence of any indication that prejudice had resulted as a result of the imperfect voting conditions, Member Walsh would not have frustrated employees' desires regarding union representation.

An Employer's Provocation of Employee Misconduct Will Not Excuse the Misconduct if the Provocation Itself Was Lawful

Amersino Mktg. Group, LLC., 351 NLRB No. 58 (Nov. 19, 2007)

A three-member panel found that a produce wholesaler acted lawfully in terminating the employment of an individual who had served as the union's election observer on the day before the termination.

The employee, Eliezer Gallardo, was a forklift operator who also had inventory responsibilities. On or around April 10, 2006, Gallardo asked Henry Wang, the employer's owner and president, to be relieved of his inventory duties. Wang agreed to try to find someone else to handle that work.

The employer held a union election on April 28, 2006, at which Gallardo acted as the union's election observer. He challenged twenty-two determinative ballots. The following day Wang called Gallardo into his office and asked him why he had not completed some of his inventory work. Gallardo responded that he had forgotten, and Wang then swore at Gallardo, stating that he was unable to view Gallardo with "good eyes" after "what had happened the day before," referring to Gallardo's participation in the election. Wang threatened to terminate Gallardo's employment if he made another mistake.

Gallardo reminded Wang of his promise to try to reassign the inventory work. Wang said that he was no longer willing to reassign the duties, and that Gallardo would have to continue doing inventory. Gallardo refused and left the office. The employer subsequently terminated Gallardo's employment.

The Board found that the employer's decision to terminate did not violate Sections 8(a)(3) or (1) of the Act. The General Counsel contended that Wang's reprimand of Gallardo over the inventory mistake had been pretextual, but the Board found this argument unpersuasive. It did not matter whether the inventory mistake was a pretext for reprimanding Gallardo because Gallardo had no right to refuse to perform the inventory work, and the employer thus acted within its rights to terminate employment.

The Board also dismissed the General Counsel's argument that Wang had impermissibly provoked Gallardo into walking out of the office, thereby violating Board precedent that an employer may not provoke an employee into committing misconduct, and then discipline the employee on the basis of that misconduct. Rather, the Board held that only *unlawful* provocation of an employee will excuse the employee's subsequent misconduct. In this case, Wang's insistence that Gallardo perform inventory duties, and reprimand for failure to do so, were not independently unlawful acts. The Board therefore found that the employer acted lawfully when it terminated Gallardo.

The Assignment of New Duties to an Existing Job Classification Constitutes an Unfair Practice

The Bohemian Club, 351 NLRB No. 59 (Nov. 19, 2007)

A three-member panel found that an employer's decision to assign additional duties to three employees constituted an unfair practice.

The employer, a private social club, employed cooks and stewards, who performed cleaning duties, in its kitchens. Though the cooks were primarily responsible for food preparation, they also had some light cleaning responsibilities, such as wiping up incidental spills and cleaning their tools.

continued on page 12

ADR Case Notes

By Steven H. Kruis, Esq.

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Employee's Pursuit of Grievance Procedure Under CBA Does Not Bar FEHA Claim

Ortega v. Contra Costa Cmty. Coll. Dist., 156 Cal. App. 4th 1073 (2007)

Jose Ortega was demoted from his position as head football coach at Contra Costa Community College, and then ultimately terminated. He filed grievances following each adverse action under the grievance procedure set forth in the collective bargaining agreement (CBA) between United Faculty, the union representing Ortega, and the Contra Costa Community College District. Because both grievance procedures were denied, Ortega filed two complaints against the district under the Fair Employment and Housing Act (FEHA) challenging the demotion and termination, and received two right-to-sue letters from the Department of Fair Employment and Housing. He then filed two separate lawsuits against the district for race discrimination, intentional infliction of emotional distress, and negligent supervision. The trial court sustained the district's demurrers without leave to amend, and dismissed both actions because Ortega failed to exhaust his administrative remedies under the CBA.

The appellate court reversed and remanded. The CBA grievance procedure, which essentially provided for arbitration, does not eliminate an employee's right to a jury trial of important statutory rights unless two conditions are met. First, the CBA must make the waiver of a jury trial "clear and unmistakable." Second, the arbitration procedures must "allow for the full litigation and fair adjudication of the FEHA claim." Here, the CBA did not contain a clear waiver of Ortega's right to proceed in the judicial forum. Indeed, it never even mentioned the term "arbitration." Moreover, the record was unclear as to whether the fact-finding process under the CBA was sufficient. Therefore, Ortega's utilization of the grievance procedure did not bar him from asserting his FEHA claims, and the trial court erred in dismissing his actions.

"A proponent of arbitration has the burden of establishing, by a preponderance of the evidence, the existence of a valid arbitration agreement as a statutory prerequisite to compelling arbitration."

Although Company Handbook Says All Employees Must Sign Arbitration Agreement, Employer Cannot Compel Arbitration Without Producing Actual Arbitration Agreement Signed by Plaintiff-Employees

Mitri v. Arnel Mgmt. Co., 157 Cal. App. 4th 1164 (2007)

Amanda Mitri and Eric Eppel were formerly employed by Arnel Management Company. They brought suit alleging sexual discrimination and harassment.

Arnel filed a petition to compel arbitration based upon a purported agreement to arbitrate. Arnel's handbook states, "Any dispute arising out of employment with the Company . . . will be settled by binding arbitration." It also provides, "As a condition of employment, all employees are required to sign an arbitration agreement," and "employees will be provided a copy of their signed arbitration agreement." In support of the petition, Arnel produced copies of its handbook and signed acknowledgments that both plaintiffs received it, but did not produce any arbitration agreements signed by plaintiffs, who denied such agreements existed. The trial court denied the petition.

The appellate court affirmed. A proponent of arbitration has the burden of establishing, by a preponderance of the evidence, the existence of a valid arbitration agreement as a statutory prerequisite to compelling arbitration. Arnel's documents do not establish that plaintiffs consented to arbitration. The handbook specifically states that employees will be required to sign an arbitration agreement as a condition of employment, which completely undermines any argument that the handbook itself was intended to constitute the "arbitration agreement." Because Arnel failed to produce the separate arbitration agreements referred to in its handbook, it has not met its burden of proving that valid arbitration agreements existed with plaintiffs. Therefore, its petition to compel arbitration was properly denied.

Wage and Hour Update

By Donna Ryu, Sarah Beard, and Matthew Goldberg

Prof. Donna Ryu (left) serves on the clinical faculty of the University of California, Hastings College of the Law. Sarah Beard (middle) is an associate with Siegel and LeWitter, a plaintiff's labor and employment firm in Oakland. Matthew Goldberg (right) is a Staff Attorney at the Legal Aid Society - Employment Law Center, where he directs the Wage Claims Project.

Pharmaceutical Representative Satisfies Outside Sales Exemption

Barnick v. Wyeth, 522 F. Supp. 2d 1257 (2007)

Plaintiff, a pharmaceutical representative, called upon physicians to discuss prescription medications and promote particular vaccines. He was required to make a certain number of visits, as well as meet a daily phone call quota. His essential function was to "effect sales by educating and guiding health care professionals in their purchase and prescription of [defendant's] products." In addition to an annual salary, plaintiff received compensation tied to the sales of products he assisted in generating. Plaintiff filed suit for violations of the California Labor Code, including claims for unpaid overtime and meal and rest period premiums. Wyeth defended on the ground that plaintiff was subject to the outside sales exemption.

Judge Wilson of the federal district court for the Central District of California granted summary judgment with respect to all claims, finding that plaintiff fell within the exemption. Plaintiff argued that he did not make direct sales, because the company's products had to be purchased by patients through pharmacies. The court noted although physicians do not actually purchase the prescription products, they control the product's ultimate purchase. The court also rejected plaintiff's argument that he was engaged in promotion, rather than sales, finding the distinction unpersuasive in plaintiff's circumstances. Such a distinction could more logically be applied in situations where an employee's efforts are directed at persuading a more general audience to purchase a product, rather than individuals.

Court Certifies Class of Drivers for Overtime Claim

Bell v. Super. Ct. (H.F. Cox, Inc.), 158 Cal.App.4th 147 (2007)

Plaintiffs, drivers for a petroleum transportation company, brought a class action suit against their employer, alleging failure to pay overtime, failure to provide meal and rest breaks, and other wage and hour violations. Plaintiffs filed a motion for class certification, which was granted only with respect to a claim for failure to pay vacation pay upon termination of employment. Plaintiffs filed a petition for writ of mandate, and the Second District Court of Appeal granted the petition, and directed the trial court to vacate its order and enter a new order granting certification of a class with respect to the overtime pay and vacation pay claims.

With respect to the overtime claim, it was undisputed that plaintiffs regularly worked over eight hours per day and over forty hours per week. Defendant Cox contended that its drivers were engaged in interstate commerce, and thus exempt from California overtime requirements under the "motor carrier exemption." Under the Department of Transportation's "four month rule," if a person drives in interstate commerce once every four months, that person is continuously subject to federal regulations, and thus exempt from California overtime requirements. Plaintiffs argued that the exemption did not apply to them, as they never drove across state lines or carried cargo destined for another state. Cox argued that as it assigns trips "indiscriminately" among its drivers, all of its drivers, even those who never crossed state lines, are subject to the federal regulations and exempt from overtime requirements.

The appellate court ordered the trial court to certify the overtime class, concluding that a class action is a superior method to adjudicate the motor carrier exemption for Cox's drivers. The dispute centers on those drivers who are not considered exempt solely on the basis of routes they actually drove across state lines. Given that the evidence indicated that any driver could be assigned to any route, the claims of any one driver could only be resolved by considering the evidence regarding *all* possible routes the driver reasonably could have been assigned. Since every driver could have been assigned any of Cox's California routes, the claim of each driver implicated all of the California routes. Denial of class certification would require hundreds of individual trials, each of which would consider the entirety of routes driven in California. There was no evidence to support the trial court's conclusion that individual issues predominated.

The court affirmed the trial court's denial of class certification with respect to the remaining claims. On the meal and rest period claims, the court found that common issues did not predominate, given that there was substantial evidence that there was no uniform policy or practice forbidding or preventing breaks.

Finally, the court rejected the trial court's finding that the class action process was not a superior means of resolving the dispute. The trial court found that drivers would be likely to pursue individual claims as their overtime claims averaged $10,000 per year. The trial court also recognized that drivers had the option of filing a claim with the Labor Commissioner. Citing the California Supreme Court's recent decision in *Gentry v. Superior Court,* 42 Ca1. 4th 443 (2007), the court noted that

continued on page 29

Cases Pending Before the California Supreme Court

By Phyllis W. Cheng

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ATTORNEYS' FEES

Vasquez v. State of Cal., 154 Cal. App. 4th 406 (2007), *review granted,* November 11, 2007. S156793/D048371. Petition for review after order affirming award of attorneys' fees. Review granted/briefing deferred pending consideration and disposition of a related issue in *Vasquez v. State of Cal.,* S143710 (*see* Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. The related issue is: Does the rule that, in order to receive attorney fees under Cal. Code Civ. Proc. § 1021.5, the plaintiff must first reasonably attempt to settle the matter short of litigation, apply to this case? (*See Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 557 (2004); *Grimsley v. Bd. of Supervisors,* 169 Cal. App. 3d 960, 966–967 (1985).)

CLASS ACTION

Arias v. Super. Ct., 153 Cal. App. 4th 777 (2007), *review granted,* 2007 Cal. LEXIS 10879 (2007). S155965/C054185. Petition for review after issuance of peremptory writ of mandate. (1) Must an employee who is suing an employer for labor law violations on behalf of himself and others under the Unfair Competition Law (Cal. Bus. & Prof. Code § 17203) bring his representative claims as a class action? (2) Must an employee who is pursuing such claims under the Private Attorneys General Act (Cal. Lab. Code § 2699) bring them as a class action? Answer brief due.

EMPLOYMENT DISCRIMINATION

McDonald v. Antelope Valley Cmty. Coll. Dist., 151 Cal. App. 4th 961 (2007), *review granted,* 2007 Cal. LEXIS 8911 (2007). S153964/B188077. Petition for review after part affirmance and part reversal of summary judgment. In an employment discrimination action, is the one-year statute of limitations for filing an administrative complaint with the Department of Fair Employment and Housing set forth in Cal. Gov't Code § 12960 subject to equitable tolling while the employee pursues an internal administrative remedy, such as a complaint with the community college chancellor filed pursuant to Cal. Code Regs. tit. 5, § 59300 et seq.? Reply brief due.

GOVERNMENT EMPLOYMENT

Mays v. City of Los Angeles, 145 Cal. App. 4th 932 (2006), *review granted,* 2007 Cal. LEXIS 2049 (2007). S149455/B188527. Petition for review granted after reversal of denial of writ of mandate. Does the Public Safety Officers' Procedural Bill of Rights Act (Cal. Gov't Code § 3300 et seq.) require that an officer facing discipline be provided with notice of both the alleged offense of which he or she is accused and the potential punishment within one year of discovery of the alleged misconduct? Fully briefed.

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 (Cal. Gov't Code § 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? Fully briefed.

HARASSMENT AND DAMAGES

Roby v. McKesson HBOC, 146 Cal. App. 4th 63 (2006), *review granted,* 2007 Cal. LEXIS 4012 (2007). S149752/C047617, C048799. Petition for review after reversal, modification and affirmance in part of judgment. (1) In an action for employment discrimination and harassment by hostile work environment, does *Reno v. Baird,* 18 Cal. 4th 640 (1998) require that the claim for harassment be established entirely by reference to a supervisor's acts that have no connection with matters of business and personnel management, or may such management-related acts be considered as part of the totality of the circumstances allegedly creating a hostile work environment? (2) May an appellate court determine the maximum constitutionally permissible award of punitive damages when it has reduced the accompanying award of compensatory damages, or should the court remand for a new determination of punitive damages in light of the reduced award of compensatory damages? Answer brief due.

LEAVES

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? Case argued on January 8, 2008.

NONCOMPETE AGREEMENTS

Edwards v. Arthur Andersen, LLP, 142 Cal. App. 4th 603 (2006), *review granted,* 2006 Cal. LEXIS 14181 (2006). S147190/B178246. Petition for review after affirmance sustaining demurrer. (1) Is a noncompetition agreement between an employer and an employee that prohibits the employee from performing services for former clients invalid under Cal. Bus. & Prof. Code § 6600, unless it falls within the statutorily- or judicially-created trade secrets exceptions to the statute? (2) Does a contract provision releasing "any and all" claims the employee might have against the employer encompass nonwaivable statutory protections, such as the employee indemnity protection of Cal. Lab. Code § 2802? Fully briefed.

PENSION

Lexin v. Super. Ct. (*People*), 154 Cal. App. 4th 1425 (2007), *review granted,* November 28, 2007. S157341/D049251. Petition for review after denial of petition for writ of prohibition. Did petitioners' service on the Board of the San Diego Retirement System, as it related to an increase in pension benefits for members of the system, violate the conflict of interest provisions of Cal. Gov't Code § 1090, and subject them to criminal prosecution, or did the non-interest exemption of Cal. Gov't Code § 1091.5(a)(9) apply? Review granted/counsel needed.

PRIVACY

Hernandez v. Hillsides, Inc., 142 Cal. App. 4th 1377 (2006), *review granted,* 53 Cal. Rptr. 3d 801 (2007). S147552/B183713. Petition for review after reversal and remand on grant of summary judgment. May employees assert a cause of action for invasion of privacy when their employer installed a hidden surveillance camera in the office to investigate whether someone was using an office computer for improper purposes, only operated the camera after normal working hours, and did not actually capture any video of the employees who worked in the office? Permission to file amicus brief granted.

PROPOSITION 209

Coral Constr., Inc. v. City & County of San Francisco, 149 Cal. App. 4th 1218 (2007), *review granted,* 2007 Cal. LEXIS 8911 (2007). S152934/A107803. Petition for review after part affirmance and part reversal of grant of summary judgment. (1) Does article I, section 31 of the California Constitution, which prohibits government entities from discrimination or preference on the basis of race, sex, or color in public contracting, improperly disadvantage minority groups and violate equal protection principles by making it more difficult to enact legislation on their behalf? (See *Wash. v. Seattle Sch. Dist. No. 1,* 458 U.S. 457 (1982); *Hunter v. Erickson,* 393 U.S. 385 (1969).) (2) Is section 31 preempted by the International Convention on the Elimination of Racial Discrimination? (3) Does an ordinance that provides certain advantages to minority- and female-owned business enterprises with respect to the award of city contracts fall within an exception to section 31 for actions required of a local governmental entity to maintain eligibility for federal funds? Reply brief due.

REPRESENTATIVE CLAIMS

Amalgamated Transit Union., Local 1756, AFL-CIO v. Super. Ct. (*First Transit, Inc.*), 148 Cal. App. 4th 39 (2006), *review granted,* 2007 Cal. LEXIS 6526 (2007). S151615/B191879. Petition for review after denial of peremptory writ of mandate. (1) Does a worker's assignment to the worker's union of a cause of action for meal and rest period violations carry with it the worker's right to sue in a representative capacity under the Labor Code Private Attorneys General Act of 2004 (Cal. Lab. Code § 2698 et seq.) or the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.)? (2) Does Cal. Bus. & Prof. Code § 17203, as amended by Proposition 64, which provides that representative claims may be brought only if the injured claimant "complies with Section 382 of the Code of Civil Procedure," require that private representative claims meet the procedural requirements applicable to class action lawsuits? Application to file amicus brief pending.

San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified Sch. Dist., 154 Cal. App. 4th 866 (2007), *review granted,* 2007 Cal. LEXIS 13320 (2007). S156961/A114679, A115686. Petition for review after reversal of trial court order granting petition for peremptory writ of mandate. (1) Does Cal. Educ. Code § 7054 permit a school district to prohibit the teachers union from using the school's mailboxes to distribute a union newsletter to its members, if the newsletter includes endorsements for school board candidates? (2) Does the guarantee of liberty of speech in Cal. Const., art. I, § 2, assure that an employee organization may distribute its message to its members concerning electoral politics via school mailboxes? Review granted/brief due.

RETALIATION

Jones v. Lodge at Torrey Pines P'ship, 147 Cal. App. 4th 475 (2007), *review granted,* 61 Cal. Rptr. 3d 1 (2007). S151022/D046600. Petition for review after reversal of judgment notwithstanding the verdict and an order granting a new trial in a civil action. May an individual be held personally liable for retaliation under the California Fair Employment and Housing Act (Cal. Gov't Code § 12900 et seq.)? Submitted/opinion due.

TERMINATION AND SUSPENSION

Ross v. Ragingwire Telecomms., Inc., 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 & Safety 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't 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? Submitted/opinion due.

Spielbauer v. County of Santa Clara, 146 Cal. App. 4th 914 (2007), *review granted,* 59 Cal. Rptr. 3d 437 (2007). S150402/H029345. Petition for review after reversal of denial of writ of mandate. If a public employee exercises his or her Fifth Amendment right against self-incrimination in a public employer's investigation of the employee's conduct, must the public employer offer immunity from prosecution before it can dismiss the employee for refusing to answer questions asked in connection with the investigation? Fully briefed.

WAGE AND HOUR

Martinez v. Combs, decision without published opinion (2003), *review granted*, 2004 Cal. LEXIS 1914 (2004). S121552/B161773. Petition for review after partial reversal and partial affirmance of summary judgment. Briefing originally deferred pending decision in *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005), which included the following issue: Can the officers and directors of a corporate employer personally be held civilly liable for causing the corporation to violate the statutory duty to pay minimum and overtime minimum wages, either on the ground such officers and directors fall within the definition of "employer" in Industrial Welfare Commission Wage Order 9 or on another basis? Fully briefed.

Harris v. Super. Ct. (*Liberty Mut. Ins.*), 154 Cal. App. 4th 164 (2007), *review granted* 2007 Cal. LEXIS 13321 (2007). S156555/B195121 (lead), B195370. Petition for review after grant of petition for writ of mandate. Do claims adjusters employed by insurance companies fall within the administrative exemption (Cal. Code Regs. tit. 8, § 11040) to the requirement that employees are entitled to overtime compensation? Review granted/brief due.

WHISTLEBLOWER PROTECTION ACT

State Bd. of Chiropractic Exam'rs v. Super. Ct. (*Arbuckle*), 148 Cal. App. 4th 142 (2007), *review granted*, 2007 Cal. LEXIS 6811(2007). S151705/C052554. Petition for review after grant of petition for peremptory writ of mandate. Whether, under the Whistleblower Protection Act (Cal. Gov't Code § 8547 et seq.), a state employee may bring a civil action after suffering an adverse decision by the State Personnel Board without successfully seeking a writ of administrative mandate to set aside that decision. Reply brief due.

Ramirez v. Dep't of Health Servs., decision without published opinion, *review granted*, 2007 Cal. LEXIS 6811 (2007). S152195/C050718. Petition for review after affirmance of judgment. Briefing deferred pending decision in *State Bd. of Chiropractic Exam'rs v. Super. Ct.*, *supra.* Holding for lead case.

NLRA Case Notes

continued from page 7

In September 2005 the employer transferred three cooks, one of whom was a union steward, into a new kitchen. The supervisor of the new kitchen instructed the cooks to wipe down the walls, counters, refrigerator doors and grills, and to sweep underneath floor mats. These tasks took approximately thirty minutes.

The employer informed the union of the new duties approximately one week later, and the union filed an unfair labor practice charge contending that the additional assignments constituted a unilateral change without an opportunity to bargain.

Reversing the administrative law judge, the Board held that the employer had violated Sections 8(a)(5) and (1) of the Act. It determined that the additional duties constituted a material change in the cooks' work assignments, which triggered an obligation to bargain.

The employer argued that the union had waived its right to bargain because it did not request bargaining over the new assignments before filing the charge. The Board disagreed, noting that the union first learned of the change one full week after the employer had already implemented it. At that point, any request to bargain would have been futile. Nor did it make a difference that one of the cooks was the union steward because, even if his knowledge of the change had been imputed to the union, he first learned about the change in duties when his supervisor assigned new tasks to him. By this time, the change was a *fait accompli.*

ature during non-working time, in non-work areas. The Board stated that "[b]eing rightfully on [an employer's] premises confers no additional right on employees to use the employer's equipment for Section 7 purposes regardless of whether the employees are authorized to use that equipment for work purposes."[17]

Dissenting "in the strongest possible terms," Members Liebman and Walsh stated, "Only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace."[18] The dissenting members would not have applied a property-rights analysis to e-mail systems; rather, because e-mail is a modern substitute for face-to-face communications, they would have analyzed Guard Publishing's policy under the rubric of *Republic Aviation*'s balancing test.[19] The dissenters also took issue with the majority's focus on what types of activities were "equal" to Section 7 activities, arguing that the essence of the violation was not "discrimination" but the "interference with Section 7 rights."[20]

Guard Publishing provides employers reassurance that they can adopt and enforce rules to protect their electronic property, as long as those rules do not discriminate on the basis of union membership or activity. It is also important to note that the Board limited its ruling to those situations in which face-to-face interaction among employees was possible. Where such interaction is limited or altogether impossible (for example, where web-based companies or companies with a telecommuting workforce are involved), the Board could find that restrictive e-mail policies unduly interfere with an employee's right to engage in Section 7 communications. The debate over the issues raised in *Guard Publishing* will likely continue for some time, as the union appealed the Board's decision to the United States Court of Appeals for the District of Columbia Circuit on January 9, 2008.

BOYCOTT ADVOCACY IN SHOPPING MALLS: THE *FASHION VALLEY MALL* CASE

Just eight days after the Board issued its decision in Guard Publishing, the California Supreme Court, in Fashion Valley Mall LLC v. NLRB,21 reached a very different conclusion on the issue of freedom of speech on private property. By a narrow 4–3 majority, California's highest court ruled that the California Constitution protects the right to urge customers in a privately owned shopping mall to boycott one of the stores in that mall. By re-affirming and even extending its 1979 decision in Robins v. Pruneyard Shopping Center,22 in which privately-owned shopping malls became public forums deserving of free speech protections, the California Supreme Court further separated California from other states in this area of constitutional law. In dissent, Justice Ming W. Chin noted that no other state has taken its free speech jurisprudence this far.23

Toward the end of 1998, the Graphic Communications International Union Local 432-M filed an unfair labor practice charge with the Board alleging that the owners of San Diego's Fashion Valley Mall (Mall) had "refused to permit employees of the Union-Tribune Publishing Company to leaflet in front of [the] Robinsons-May" department store, in violation of Section 8(a)(1) of the Act.[24] Thirty to forty union members had distributed leaflets to customers entering and leaving the department store, an advertiser in the Union-Tribune, asking them to call the newspaper's chief executive officer regarding the newspaper's alleged unfair treatment of its employees.[25] Mall officials had quickly responded to the scene, notifying union members that they were trespassing because they had not obtained an "expressive activity" permit.[26] In order to have obtained such a permit, union members would have had to agree to abide by controversial Mall Rule 5.6, which prohibited "impeding, competing or interfering with the business of one or more of the stores or merchants in the shopping center by . . . [u]rging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center."[27]

After an administrative law judge and the Board both found in the union's favor, the United States Court of Appeals for the District of Columbia Circuit sought guidance from California's highest court on the question of whether a shopping center could lawfully ban from its premises speech urging the public to boycott a tenant.[28] A bare majority of California's Supreme Court justices answered no.[29] Writing for that majority, Justice Carlos Moreno reiterated that private shopping malls were public forums and stated that, although content-neutral time/place/manner restrictions on speech are lawful, the Mall's restriction went too far. The rule effectively sought to prohibit an entire category of speech—boycott advocacy—simply because the Mall disagreed with the *viewpoint* of that speech and worried about the effect it would have on listeners.[30] Justice Moreno applied strict scrutiny to analyze the Mall's rule, finding that "the Mall's purpose to maximize the profits of its merchants is not compelling compared to the union's right to free expression."[31]

In a forceful dissent, Justice Chin repeatedly called for the court to "join the judicial mainstream," overrule its almost thirty-year-old *Pruneyard* decision, and return private shopping malls to private property status.[32] Justice Chin also criticized his colleagues for finding that "the right of persons to use property they do not own is more compelling than the landowner's right to use its own property for the very purpose it exists."[33] According to Justice Chin, the strict scrutiny test applicable to the government has no application to private property owners, and it is wrong to force a private property owner to allow an activity that contravenes the property's purpose.[34]

In the wake of *Pruneyard*, many malls and other shopping centers had instituted increasingly restrictive rules as a way to curb protester antics. Now, with the *Fashion Valley Mall* decision, these rules will likely require careful reexamination. *Fashion Valley Mall* will undoubtedly pose new challenges for California lawyers representing property owners, business owners, employers and unions, as they confront the complex, emotional issues surrounding businesses' desire to insulate customers from labor disputes and retain customer loyalty on the one hand and the right recognized in this decision for a union or other group to reach out to an increasingly wide audience on the other.

SUBCONTRACTOR EMPLOYEES HANDBILLING ON OWNER'S PROPERTY: THE *NEW YORK NEW YORK* CASE

The Board will soon have another opportunity to speak to the issue of how much control a private property owner has over its property, when it decides a case involving the "New York New York" Las Vegas hotel and casino (NYNY) and a union that was seeking to organize restaurant workers employed by the Ark Las Vegas Restaurant Corporation (Ark), which subcontracts with NYNY to operate several restaurants and fast-food outlets inside the NYNY complex via a leasehold.[35] At the end of 2007, the Board heard oral argument on the issue of whether NYNY violated the Act by denying off-duty Ark employees access to NYNY property to distribute union literature to the public. With three vacancies on the Board (only Members Liebman and Schaumber remain),[36] a decision may not be forthcoming for some time, but without question, the Board will again have to address the applicability of the *Republic Aviation* balancing test previously discussed in *Guard Publishing*.

In July 1997, three off-duty Ark employees came onto NYNY's property and stood on a sidewalk in an area located just outside the main entrance to the casino, also known as the "porte-cochere" area.[37] These Ark employees distributed handbills to casino customers, which disclaimed any labor dispute with NYNY, but described as "unfair" the fact that Ark employees were not working under a union contract. The leaflets contained a chart purporting to illustrate the difference between the wages and benefits of Ark employees and those of other unionized employees working along the Las Vegas Strip, and urged customers to contact Ark managers about negotiating a fair union contract with employees. An NYNY representative told the Ark employees that they were trespassing on private property and escorted them off of NYNY property after they refused to leave.

In April 1998, four off-duty Ark employees entered the NYNY premises and stood outside of the entrances to two restaurants operated by Ark for NYNY. The Ark employees distributed handbills to customers as they entered and exited the restaurants, as well as to NYNY customers as they passed by the entrances to the Ark-operated restaurants. The handbills were very similar to those distributed the previous summer, but did not expressly disclaim a labor dispute with NYNY. Once again, NYNY personnel told the Ark employees that they were trespassing on private property and escorted them from the complex.

Initially, the two incidents were separated into two different cases before the Board. With respect to the July 1997 incident (NYNY I), the administrative law judge (ALJ) found that NYNY had violated the Act by removing Ark employees from NYNY property, as the employees enjoyed a *Republic Aviation* right of access to non-work areas to conduct handbilling.[38] The Board agreed, stating that "employees of a subcontractor of a property owner who work regularly and exclusively on the owner's property are rightfully on that property pursuant to the employment relationship, even when off duty."[39] With respect to the April 1998 incident (NYNY II), the ALJ likewise found that NYNY had violated the Act by prohibiting the Ark employees from distributing handbills outside Ark-operated restaurants.[40] The Board again concurred, stating that the off-duty Ark employees were not trespassing but were lawfully on NYNY premises pursuant to their employment relationship with Ark.[41] The U.S. Court of Appeals for the District of Columbia Circuit consolidated NYNY I and NYNY II for briefing and argument, and then remanded to the Board—finding, among other things, that the Board had "provided no rationale to explain why, in areas within the NYNY complex but outside of Ark's leasehold, Ark's employees should enjoy the same [Section] 7 rights as NYNY's employees."[42]

At oral argument, the Board focused on many of the questions posed by the District of Columbia Circuit in order to refine its previous analysis, which included: Does the fact that Ark employees work on NYNY premises give them *Republic Aviation* rights throughout all of NYNY's non-work areas?[43] Or, are Ark employees some sort of invitee, with rights inferior to NYNY employees?[44] Are Ark employees trespassers on NYNY property, despite the contractual relationship between Ark and NYNY?[45] Does it matter that Ark employees were communicating with NYNY (and possibly Ark) guests and customers, and not other Ark employees?[46] Has NYNY completely waived its property rights by voluntarily bringing Ark onto its property to operate a business in interstate commerce?[47] Does it matter that Ark had a leasehold with NYNY;[48] what if Ark were simply a single concessionaire? The answers to these questions will have a profound effect both on the status of access rights to private property and the labor relations strategies for both employers and unions.

ENDNOTES

1. The authors wish to thank Grissel Seijo for her contributions. This article reflects solely the views of the authors.
2. Members Peter C. Schaumber and Peter N. Kirsanow joined then-Chairman Robert J. Battista for the majority view.
3. *The Guard Publ'g Co.,* 351 NLRB No. 70, slip op. at 1 (Dec. 16, 2007).
4. *Id.* at 2–3.
5. *Id.* at 2.
6. *Id.* at 3.
7. *Id.*
8. *Id.* at 2.
9. *Id.* at 10–11.
10. *Id.* at 8.
11. *Id.* at 9.
12. *Id.* at 10.
13. *Id.*
14. 324 U.S. 793 (1945).
15. *The Guard Publ'g Co.,* 351 NLRB No. 70, slip op. at 8.
16. *Id.* at 6.
17. *Id.* at 7.
18. *Id.* at 12 (Liebman and Walsh, Members, dissenting).
19. *Id.* at 16–17.
20. *Id.* at 20.
21. Case No. S144753, 2007 Cal. LEXIS 14427 (Dec. 24, 2007).
22. 447 U.S. 74 (1980).
23. *Fashion Valley Mall,* 2007 Cal. LEXIS 14427, at *50-*54.
24. *Id.* at *2.
25. *Id.* at *3-*4.
26. *Id.* at *4.
27. *Id.* at *5.
28. *Id.* at *8.
29. *Id.* at *2.

30. *Id.* at *30-*31.
31. *Id.* at *39.
32. *Id.* at *41-*42, *69 (Chin, J., dissenting).
33. *Id.* at *68 (Chin, J., dissenting).
34. *Id.* at *42, *67 (Chin, J., dissenting).
35. Case Nos. 28-CA-14519 and 28-CA-15148.
36. Chairman Robert J. Battista's term ended on December 16, 2007. Member Dennis P. Walsh served a recess appointment that expired with Congress's final adjournment for 2007. Although Member Walsh was appointed to a term through 2009, the Senate did not act on his appointment prior to adjournment, and his seat is now vacant. Member Peter N. Kirsanow also served a recess appointment that expired with Congress's final adjournment for 2007. Member Kirsanow was appointed to a term expiring in 2008, but again, the Senate did not act on this appointment before its end-of-year adjournment. Member Kirsanow's seat is now vacant. On December 28, 2007, the Board issued a press release announcing that it had delegated its powers such that the two-member quorum of Members Liebman and Schaumber could issue decisions on the Board's behalf in unfair labor practice and representation cases. The press release stated that the Board will revoke this delegation once membership returns to at least three members.
37. Facts taken from the briefs filed by the parties and *amici* in this case.
38. 334 NLRB No. 87, slip op. at 9.
39. *Id.* at 1.
40. 334 NLRB No. 89, slip op. at 8.
41. *Id.* at 2.
42. *New York New York, LLC v. NLRB,* 313 F.3d 585, 588 (D.C. Cir. 2002).
43. Transcript of Oral Argument, *New York New York Hotel & Casino,* Case 28-CA-14519 (Nov. 9, 2007).
44. *Id.* at 34–48.
45. *Id.* at 37.
46. *Id.* at 19–22.
47. *Id.* at 24, 35.
48. *Id.* at 25–28.

Green v. State of California

continued from page 4

order to establish a violation of the ADA and that a "qualified individual" can perform the essential job duties with or without a reasonable accommodation. The court examined numerous federal cases analyzing the ADA and its predecessor, the Rehabilitation Act of 1973, before concluding that the qualification element was established and maintained because under federal law, it is not unlawful to draw distinctions on the basis of a disability if that disability renders an employee unqualified to perform the essential duties even with reasonable accommodation.

In comparison to the ADA, the FEHA provision does not include language specifying that a plaintiff be a "qualified individual." However, like the ADA, the FEHA does make clear that drawing distinctions on the basis of physical or mental disability is not prohibited discrimination in itself as with other protected classes. The court succinctly deciphered the manner in which the FEHA mirrored the ADA, not in language, but in intent. It looked to the plain language of the proviso which expressly provides that drawing distinctions is prohibited on the basis of disability *only if* the adverse employment act occurs because of a disability *and* the disability would not prevent the employee from performing the essential duties of the job even with reasonable accommodation. In other words, in the case of disability discrimination, "the plaintiff has not shown that a defendant employer has done anything wrong until the plaintiff can show that he or she was able to do the job with or without reasonable accommodation."[7]

The court found that this striking similarity between the FEHA and the ADA was not a coincidence but reflected the Legislature's deliberate attempt to conform the FEHA provision, which addressed all forms of prohibited discrimination based on protected classifications, with an ADA provision specifically drafted to address only disability discrimination.[8] Quoting from a legislative analysis of the Legislature's amendment of the FEHA to require that an employee be able to perform the essential duties, the court observed that "the Legislature's 'conformity [to the ADA rules] will benefit employers and businesses because they will have one set of standards with which they must comply in order to be certain that they do not violate the rights of individuals with physical or mental disabilities.' "[9] The court then reasoned that the Legislature incorporated the ADA requirement with full knowledge of the purpose the "ability to perform" language serves in the ADA and that the Legislature intended it to serve the same purpose in the FEHA—"as a means of distinguishing permissible employment practices from impermissible disability discrimination based on the employee's ability to perform in the particular employment position with reasonable accommodation."[10]

Based on the similarity in language and purpose of the FEHA to the ADA, the supreme court found no reason to construe the burden of proof differently. It held that "in order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation,"[11] tacitly repudiating the position of the court of appeal and the dissenting justices who posit that lack of qualification is merely an exception and affirmative defense to the prohibition against disability discrimination. The court then looked to the general rule in California that a plaintiff has the burden of proving all facts essential to a claim for relief and found its position to be consistent with that rule.[12]

A MATTER OF LOGIC

The dissent, passionately crafted by Justice Werdegar, deemed the majority's opinion problematic for various reasons, but identified an error in logic as the most serious flaw: "Because section 12940(a)(1) relieves employers from liability for firing or refusing to hire a disabled person if the disability prevents that person from performing the position's essential functions, the majority reasons, proof of ability to perform must be part of the plaintiff's case," Justice Werdegar wrote.[13] The reasoning is wrong, according to Justice Werdegar, because proof of an exception typically is a defendant's burden and should be so in discrimination actions. Ruling to the contrary, she noted, creates a rule never intended by the Legislature—that individuals with disabilities are presumed unable to work until they prove otherwise.

The distinction between the two opinions is made clearer when Justice Werdegar compares disability discrimination to gender discrimination, explaining that evidence that an act was motivated by an employee's gender is direct evidence of discrimination which does not require a plaintiff to also demonstrate that he or she was qualified for the position.[14] Similarly, she asserts, evidence that an act was motivated by an employee's inability to work due to a disability is direct evidence of disability discrimination. In such cases, according to the dissent, qualification is an excuse posited by the defense, not part of the plaintiff's case.[15]

The dissent arguably misinterprets the majority's logic, however, as the majority reads section 12940(a)(1) not as "relieving an employer from liability" where an employee cannot perform, but as precluding the imposition of liability in the first instance. The rationale underlying the majority opinion lies in recognizing that Government Code section 12940(a) contemplates the existence of lawful personnel actions that are based on work restrictions caused by one's disability.[16] This deduction is predicated on the language in the FEHA, indicating that the prohibition against unlawful discrimination does not prohibit an employer from refusing to hire or terminating an employee who cannot perform the essential job duties.[17]

The majority found the phrase "does not prohibit" to be unambiguous. They understand it to mean that the acts described thereafter are not unlawful because they are not proscribed. There is a difference in the majority's view between an act not being proscribed and an act being excused. Under the FEHA, when an act is excused, it generally means

that while it would otherwise constitute unlawful discrimination, that specific form of discrimination has been determined legally acceptable, as with a bona fide occupational qualification,[18] for example.

The court implicitly applied the "Descriptive Nature Test," which finds immaterial that a proviso appears to be an exception to an offense.[19] When the proviso is so pertinent to a claim that it constitutes a part of the definition or description of the offense, it is an element of the claim that must be proved to prove the claim. Unlike gender discrimination, the Legislature required that to prove disability discrimination, an adverse act must not only have been motivated by a plaintiff's protected class, but the plaintiff must also be able to perform essential job duties. It is a fundamental principle of jurisprudence that plaintiffs always bear the burden of proving they are entitled to relief. Thus, it was logical to assign the burden attendant with this proviso to the plaintiff because it is the plaintiff who is making the claim of unlawful discrimination and seeking relief.

The dissent further expounds on the perceived logical fallacy of the majority, asserting that "in effect, the majority creates a presumption that people with disabilities cannot perform in the workplace and that the plaintiff is being forced to prove that he or she can perform."[20] This view, however, contrasts starkly with the presumption the majority seeks to avoid: that employers have engaged in unlawful discrimination absent any evidence that the personnel decision was, in fact, unlawful. The court gave deference to the legislative intent that an employer not be required to employ an individual who cannot perform essential job duties. The FEHA provision applies to all employers and is not limited to employers who can produce evidence to convince the jury of inability to perform as an affirmative defense. After *Green,* a plaintiff is required to provide evidence that the employer's conduct was prohibited by the FEHA *before* the employer is compelled to defend the alleged unlawful discrimination. Ultimately, this is what the court found to be the logical allocation of burdens.

ENDNOTES

1. 42 Ca1. 4th 254 (2007).
2. California Jury Instructions, Civil, Book of Approved Jury Instructions, is cited as BAJI.
3. Green presumably contracted the disease while working on the sewer pipes at CIM.
4. 57 Cal. App. 4th 228 (1997).
5. CACI means California Civil Instructions (pronounced "kay see"), and is the name of the official civil jury instructions and verdict forms approved by the Judicial Council of California Civil Jury Instructions on July 16, 2003. Although the use of CACI are not mandated, BAJI are no longer officially approved by state court rules. *See* Rule 2.1050 of the Cal. Rules of Court; Civil Jury Instructions Resource Center Frequently Asked Questions, http://www.courtinfo.ca.gov/jury/civiljuryinstructions/faqs.htm#1 (last visited Jan. 22, 2008).
6. The trial court had inexplicably failed to instruct the jury on BAJI No. 12.14, an affirmative defense regarding inability to perform proffered by the defense and granted by the court when the court rejected the special instruction.
7. *Green, supra,* 42 Ca1. 4th at 265.
8. This difference is relevant to the extent that the dissent suggested the Legislature would have amended Government Code section 12940(a)(1) to include the language "qualified individual" if it intended plaintiff to have the burden of proving qualification or ability to perform. Because that provision refers not only to disability discrimination, but also prohibits all other forms of unlawful discrimination, the Legislature could not amend that language with respect to disability discrimination without also affecting every other form of discrimination, in which there is no need for plaintiff to be a qualified individual as defined by the ADA.
9. *Green, supra,* 42 Ca1. 4th at 263, *citing* Assem. Comm. on Judiciary, analysis of Assem. Bill No. 1077 (1991–1992 Reg. Sess.) at 4, as amended Jan. 6, 1992.
10. *Id.* at 263.
11. *Id.* at 262.
12. *See* Evidence Code section 500, which states that "unless otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."
13. *Green, supra,* 42 Ca1. 4th at 267.
14. *Id.* at 276 n. 8.
15. *Id.*
16. The majority would point out that pursuant to the FEHA, the disability discrimination is not unlawful unless that employee also produces evidence that he or she could perform the essential job duties with or without reasonable accommodation.
17. Gov't Code § 12940(a)(1).
18. Gov't Code § 12940(a); CACI No. 2501.
19. *People v. Gott,* 26 Cal. App. 4th 881, 886 (1994) citing *Ex Parte Hornef,* 154 Cal. 355 (1908) (" 'The question is whether the exception is so incorporated with, and becomes a part of the enactment, as to constitute a part of the definition, or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception and not its location which determines the question. Neither does the question depend upon any distinction between the words 'provided' and 'except' as they may be used in the statute. In either case, the only inquiry arises, whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated, it shall be negatived, otherwise it is a matter of defense.' The court further said that such exceptions and provisos were to be negatived in the pleading only where they are descriptive of the offense or define it, and that where they afford [a] matter of excuse merely, they are to be relied on in defense. (*Id.* at 359–60.).")
20. *Green, supra,* 42 Ca1. 4th at 268.

Public Sector Case Notes

continued from page 5

forty-one other individuals. Because the pay increase was applicable only to persons in his position, and not to all other members of the class, it followed that his increase was not part of his pay rate within the meaning of section 20636.

COMMUNITY COLLEGE TEACHERS

Failure to Exhaust a Grievance Remedy Does Not Preclude Challenging a Termination Under the Fair Employment and Housing Act

Ortega v. Contra Costa Cmty. Coll. Dist., 156 Cal. App. 4th 1073 (2007)

The plaintiff was a probationary instructor for a community college district. In addition to teaching physical education, he served as the head football coach. When he was removed from his position as head football coach, he filed a grievance through his union alleging a violation of the collective bargaining agreement. During the following year, and before the grievance could be heard, the plaintiff was terminated by the community college district as a probationary employee. He filed a grievance challenging his termination, but the collective bargaining agreement provided that probationary employees could not grieve termination actions. Plaintiff filed complaints with the California Department of Fair Employment and Housing alleging racial discrimination regarding both his removal as head football coach, and later over his termination. When he received right-to-sue letters, he sued for racial discrimination and violation of Government Code section 12940, intentional infliction of emotional distress and negligent supervision. The community college district filed a motion to dismiss based upon the failure to exhaust the applicable grievance process. He filed a second complaint over his termination alleging race discrimination, intentional infliction of emotional distress, negligent supervision, retaliation in violation of a Government Code and wrongful termination in violation of public policy. He sought reinstatement to his position as head football coach as part of his remedies in the second action. The trial court dismissed both actions. In connection with the second lawsuit the court noted that the plaintiff had not alleged that he exhausted his administrative remedies. The trial court held that it was without jurisdiction to hear the case.

The court of appeal reversed the trial court, noting that in *Schifando v. City of Los Angeles,* 31 Ca1. 4th 1074 (2003), the supreme court held that a public employee who claims to have suffered employment-related discrimination need not exhaust an available internal administrative remedy prior to suing on a claim under the Fair Employment and Housing Act. The court distinguished this from the decision of the California Supreme Court in *Johnson v. City of Loma Linda,* 24 Ca1. 4th 61 (2000), wherein an individual who had been terminated and pursued his grievance remedies to adverse conclusion but had failed to challenge an adverse decision was found to have failed to exhaust his administrative remedies. Where a public employee elects to utilize the civil service remedies provided and receives an adverse finding, that finding binds the trial court in any subsequent FEHA action unless its finding is overturned in a mandate proceeding. In the instant case the district argued that the plaintiff only initiated the internal grievance procedure provided in the collective bargaining agreement following each adverse employment action. However, in the instant case the court noted that there was a critical difference where an employee's administrative remedies are provided by statute and where, as in the instant case, they were provided by a collective bargaining agreement. Under *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), an arbitration procedure was mandated by a collective bargaining agreement. But the U.S. Supreme Court held that an adverse decision by an arbitrator did not bar an employee's subsequent claim under Title 7. In the *Johnson* case the grievance procedure was not a contractual grievance procedure but rather a statutory grievance procedure. A collective bargaining grievance procedure does not eliminate the right to a jury's determination of important state statutory rights afforded to individual workers unless the collective bargaining agreement clearly and unmistakably provides that the resolution of the issue by arbitration eliminated such a right and the arbitration procedures allow for the full litigation and fair adjudication of a FEHA claim.

CONSTITUTIONALLY PROTECTED SPEECH OF PUBLIC EMPLOYEES

Public Employee Complaints Regarding Corruption of Supervisors May Be Protected by First Amendment

Marable v. Nitchman, No. 06-35940, 2007 WL 44853242 (9th Cir. Dec. 26, 2007)

The plaintiff was suspended and demoted from his employment as a chief engineer for the Washington State Ferries. He sued the supervisors of the entity by which he was employed for instituting disciplinary action against him. His supervisors contended that he had engaged in misconduct including acts of insubordination. However, the plaintiff asserted that the defendants were retaliating against him for speaking out against their corruption. He asserted that they engaged in schemes such as claiming inappropriate overtime and using "special projects" to supplement their pay inappropriately. Plaintiff's action was filed under 42 U.S.C. section 1983, alleging violation of his First Amendment rights. The trial court granted summary judgment for the defendants. However, the Ninth Circuit reversed and remanded based upon the United States Supreme Court's decision in *Garcetti v. Ceballos,* 547 U.S. 410 (2006) and the Ninth Circuit's decision in *Freitag v. Ayers,* 468 F. 3d 528 (9th Cir. 2006).

The Ninth Circuit reviewed the case de novo since the trial court had ruled on summary judgment. It found that plaintiff's complaints concerning his superiors' allegedly corrupt payment schemes were not in any way a part of his official job duties. It noted that although his job description was not necessarily dispositive, his job description did not include pointing to corrupt actions of higher level officials whom he purportedly thought were abusing the public trust in converting public funds to their own use by overpayments schemes. His official duties related to "ensuring that all machinery aboard [his] vessel, both mechanical and electrical, . . . was properly maintained and serviced." Thus, when he spoke out regarding alleged corruption, he was engaging in protected free speech.

PUBLIC EMPLOYEES' CONSTITUTIONAL RIGHTS

Employees Who Are Required to Remain at Work During Internal Investigations Into Suspected Misconduct Are Not "Seized" for Purposes of the Fourth Amendment

Aguilera v. Baca, 510 Fed. 3d 1161 (9th Cir. 2007)

The plaintiffs were Los Angeles County deputy sheriffs. They alleged in a suit filed under 42 U.S.C. section 1983 that they were improperly detained at work while they were questioned in connection with an internal criminal investigation into their possible misconduct while on uniform patrol duty. The deputies were ordered to remain at the station to be interviewed after their shifts had concluded. They were never placed under arrest. They were never searched. They were not physically restrained or otherwise touched or subjected to the use of force. They were offered food and other refreshments and were allowed to talk to each other, to sleep, and to make and receive phone calls and go to the bathroom unescorted. Each of them declined to provide any statements on advice of counsel. They were not asked to waive any privileges against self-incrimination, or otherwise compelled to make a statement. Two months later they were compelled to make statements. No charges were ever brought against them.

The instant case called into question whether or not under the Fourth Amendment the individuals had been "seized." The Court of Appeals for the Ninth Circuit held that they had not been seized within the meaning of the Fourth Amendment. The court relied in part on the fact that each of the deputies involved was well versed through training and on-the-job experience in the manner in which employees are placed under arrest. Under the circumstances, they must have been aware that when they were not searched, booked and otherwise treated as persons under arrest, they must have known that they had not been in a situation of "criminal seizure." According to the majority, their Fifth and Fourteenth Amendment rights had not been violated when they were questioned about possible misconduct, given that they were not compelled to answer questions or waive their immunity against self-incrimination.

Chief Judge Kozinski dissented from the affirmance of the summary judgment. He pointed out the "ambiguity" of a law enforcement agency acting as both an employer and a criminal investigation entity. He would hold that an employer in this situation must make it clear in what capacity it is acting. In short, he felt that there was a triable issue of fact as to whether the plaintiffs were under arrest. Similarly, Judge Kozinski argued, there was a triable issue as to whether the employer's conduct constituted compulsion.

PEACE OFFICER BILL OF RIGHTS

Peace Officer Bill of Rights Do Not Apply to Officers Who Are Subject to Criminal Investigations Conducted by Their Employers

Van Winkle v. County of Ventura, 158 Cal. App. 4th 492 (2007)

The Public Safety Officers Procedural Bill of Rights (POBRA), Government Code section 3300 et seq., provides certain protections for law enforcement officers who are subjects of administrative investigations. Included among these protections is the right to be informed of certain matters before being asked to provide information. (Gov't Code § 3303.) The plaintiff was arrested for embezzling property from the sheriff's department. He challenged his termination and brought an action under the POBRA for injunctive relief claiming that the statements that he made during a criminal investigation must be suppressed and not introduced at his civil service hearing. The trial court enjoined the county from using statements made during an in-custody criminal interrogation, but did not enjoin the county from using statements which the plaintiff made during a sting operation. This case arose in the unusual context of an injunction in advance of the civil service hearing, and thus there were no evidentiary rulings made by the civil service commission's hearing officer.

Both the plaintiff and the county appealed the trial court's action. The court of appeal held in favor of the county, concluding that the POBRA did not apply to statements made during the sting operation and that it also did not apply to statements made during the "in custody" criminal interrogation. The court of appeal vacated the injunction. Government Code section 3303, provides in part that the POBRA does not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any public safety officer. Furthermore, the POBRA does not apply to "an investigation concerned solely and directly with alleged criminal activities." The trial court had relied on dicta in *California Correctional Peace Officers Association v. State of California,* 82 Cal. App. 4th 294, 309 (2000) (CCPOA), that criminal investigation of law enforcement officers by their employers falls within the POBRA. The court of appeal in the instant case distinguished the CCPOA because that case did not involve a law enforcement agency's sting operation which was designed to stop its officers from engaging in ongoing crimes. The CCPOA case involved an investigation of prison guards concerning a prior incident involving the guards' alleged instigation of an attack on an inmate. The Department of Corrections had threatened its employees with criminal and disciplinary action for not cooperating with the investigation. In dicta the court stated, "Almost every administrative investigation of alleged misconduct could be recast as a criminal investigation to avoid the requirements of the Act. Thus, we agree that criminal investigations referred to in subdivision (i) of section 3303 . . . must be ones conducted primarily by outside agencies without significant active involvement or assistance by the employer." The court of appeal in the instant case felt that the Legislature had defined investigations which were subject to the POBRA, such as disciplinary actions, and distinguished those from those which were not, e.g. routine investigations and criminal investigations. The POBRA does not distinguish between employer instigated investigations and non-employer law enforcement investigations.

PUBLIC EMPLOYEES

County Civil Service Commission May Not Impose Discipline Which Is Not Authorized Under a Memorandum of Understanding With Union

Valencia v. County of Sonoma, 158 Cal. App. 4th 644 (2007)

An alcohol and drug services counselor employed by the Sonoma County Department of Health Services was terminated by the Director of Health Services as a result of alleged misconduct. The employee appealed his order of termination. Under the Sonoma County Code, the civil service commission may "prescribe, amend and enforce rules for the classified service, . . . make investigations concerning enforcement in effect . . . of the rules and efficiency of the service." It may also make rules concerning "promotion, demotion, transfer and reinstatement." It also hears appeals of dismissals, suspensions and reductions in rank or compensation. The employee's appeal was heard by the commission which vacated his termination and imposed a limited suspension and a temporary reduction in salary. That discipline was consistent with the memorandum of understanding (MOU) entered into by the county and the plaintiff's union. However, the county counsel appeared at a subsequent commission meeting and asked the commission to re-evaluate its decision and impose a harsher discipline. The commission agreed and permanently demoted the plaintiff, ordering him to serve a new one-year probationary period. This discipline was in excess of the discipline that was authorized by the MOU. The trial court granted a writ of mandate and directed the commission to reconsider its decision and, at its discretion, impose discipline which was consistent with the MOU. The court of appeal affirmed. On appeal the county maintained that the trial court was attempting to interfere with the commission's discretion by requiring the civil service commission to comply with its interpretation of the language of the MOU. The county asserted that the commission did not abuse its discretion in imposing harsher discipline because its discretion was not limited or governed by the MOU.

The court of appeal noted that the MOU was a binding agreement between the employee organization and the local government. (*Glendale City Employees' Ass'n v. City of Glendale,* 15 Ca1. 3d 328, 336 (1975)) According to the court, to hold that the agreement was only binding on the county but not the civil service commission would make the MOU illusory. The county's board of supervisors had approved the MOU and the language that purported to bind the commission, yet, the court noted, the county was now disavowing its own action. The court did not agree that because the county civil service commission did not participate in the negotiations which led to the MOU, that it was not bound by it, notwithstanding the county's argument which relied upon *Los Angeles County Civil Commission v. Superior Court,* 23 Ca1. 3d 55 (1978). The court also disagreed with the county's argument that the civil service commission's autonomy meant that it was not bound by an agreement entered into by the county. The commission is an agency of the county and is bound by agreements entered into by its governing body where that agreement expressly lists the commission as one of the entities bound by its terms.

JOINT POWERS AGREEMENT

Status of a Consortium Under a Joint Powers Agreement as an Employer or Joint Employer

Joseph Doherty v. San Jose/Evergreen Cmty. Coll. Dist.; James O'Neil v. San Jose/Evergreen Cmty. Coll. Dist., PERB Decision 1928 (2007)

The charging parties were originally employed by the San Jose/Evergreen Community College District (District). They were hired in a part-time capacity to teach classes for police officers, fire fighters and other public safety personnel. A joint powers agreement (JPA) was entered into by that District and other community college districts, which became known as the "Consortium." The purpose the Consortium was to provide classes for students of the various districts. Under the JPA, each member district generated full-time equivalent student revenues (FTES). Each participating district member committed to generating a minimum of twenty-five FTES, which is a measurement of student attendance. The agreement also provided that instructional personnel would be recommended by the Consortium but employed by a contract with one of the participating community college districts. The bylaws of the Consortium provided that "All instructional staff shall be contracted from member districts via a written agreement with the Consortium." The staffing agreement stated that employees provided to the Consortium "shall not be considered employees of the [Consortium], but of the district, for purposes of seniority, placement or advancement on the district's salary schedule or accruing any other rights or privileges afforded district employees under district collective bargaining agreements and policies." Notwithstanding that language, the instructors were paid at rates set by the Consortium, rather than the various salary schedules in district collective bargaining agreements. However, the instructors were "boarded" by the various districts, meaning that the districts would confirm that an instructor meets Title 5 minimum qualifications in a particular faculty service area or academic discipline. The Consortium did not have the legal authority to "board" instructors, nor could the Consortium legally generate FTES.

The charging parties were both hired and boarded by the District. They received paychecks from the District, and the District contributed into the California State Teachers Retirement System on their behalves. The District was reimbursed for those costs by the Consortium. Although the staffing agreement provided that evaluations of the instructional faculty would be done in accordance with District policies, the District did not evaluate or supervise the Consortium faculty. Generally speaking, the collective bargaining agreements between the participating districts and employee organizations representing employees of those districts ignored Consortium instructors.

The charging parties questioned a Consortium rule which restricted the hours which they could teach to keep them below the 60 percent level which demarcates the difference between a part-time and a full-time instructor in community colleges. (Educ. Code § 87482.5.) The charging parties sought the assistance of the union which represented instructional employees of the San Jose/Evergreen Community College District. The union, through its attorney, sent a letter to both the District and the Consortium asserting that the charging

parties should be reclassified as probationary employees because they had worked in excess of the 60 percent limit in several of the preceding semesters. Shortly thereafter, the Consortium began reducing the hours assigned to the charging parties, finally eliminating all hours for one of them. The charging parties filed unfair practice charges with the Public Employment Relations Board (PERB) accusing only the District, and not the Consortium, of retaliation for engaging in protected concerted activities. Pursuant to *North Orange County Regional Occupational Program* PERB Decision No. 857 (1990), a consortium as a public joint powers agency was deemed to be outside of the PERB's jurisdiction because consortiums are not included as "employers" under the Education Employment Relations Act (EERA) definition.

The administrative law judge found in favor of the charging parties, finding that the District and the Consortium were "joint employers" and that the District, through the actions of the charging parties' supervisors (Consortium employees), had retaliated against them for engaging in protected activities.

By a two-to-one decision the PERB reversed the administrative law judge's proposed decision and dismissed the case. The majority found that "The District and the Consortium have apparently disregarded most of the provisions in the JPA Agreement, the staffing agreement and the bylaws . . . regarding the employment, management and supervision of the Consortium's faculty." The District, according to the majority, ceded virtually all control over the charging parties to the Consortium after initially hiring and "boarding" them. Thus, without input or assistance from the District, the Consortium selected, evaluated, scheduled, supervised and counseled the charging parties.

Board member Shek submitted a vigorous dissent, "In my opinion, the majority's rationale stated above would provide an unwarranted safe harbor for the District, which would otherwise be subject to the jurisdiction of the Educational Employment Relations Act (EERA) pursuant to the provisions of full-time equivalent student (FTES) regulations and the operational documents, if not for the fact that it had 'consistently and repeatedly . . . largely ignored and routinely breached' the contract language of the employment provisions in the Operational Documents. . . . I believe that the majority's interpretation of the law and the Operational Documents would give the District an excuse not to fulfill its duties to control and direct District employees who are Consortium instructors—obligations which are concomitant to its receipt of state funding. There is no allegation that the parties officially terminated any of the agreements, notwithstanding the District's alleged abandonment of the governing terms of the Operational Documents. I would thus find these agreements to be still operative since the Consortium's share of state FTES funding defends upon District's retention of control over the employees. More significantly, the charging parties would lack protection in the absence of PERB's assertion of jurisdiction. The majority's finding that the District is not an employer of the charging parties may leave them without a PERB remedy. I submit this would frustrate the intent of the law." Although Board member Shek relied on the authority of PERB's decision in *Ventura County Community College District,* PERB Decision No. 1547 (2003), she stated that the argument in favor of finding that the District here is a joint employer of Consortium instructional staff is "even more persuasive than the argument in favor of joint employer status in *Ventura.*"

A petition for extraordinary relief has already been filed with the Sixth Appellate District of the Court of Appeal of the State of California. Legislation is pending which would change the definition of "employer" in the EERA to include public school district joint powers agreements. (A.B. 1463 (2007))

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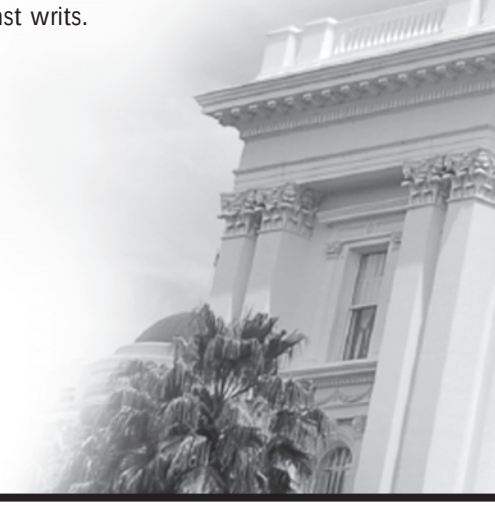

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SESSION 10

Hot Issues in Collective Bargaining

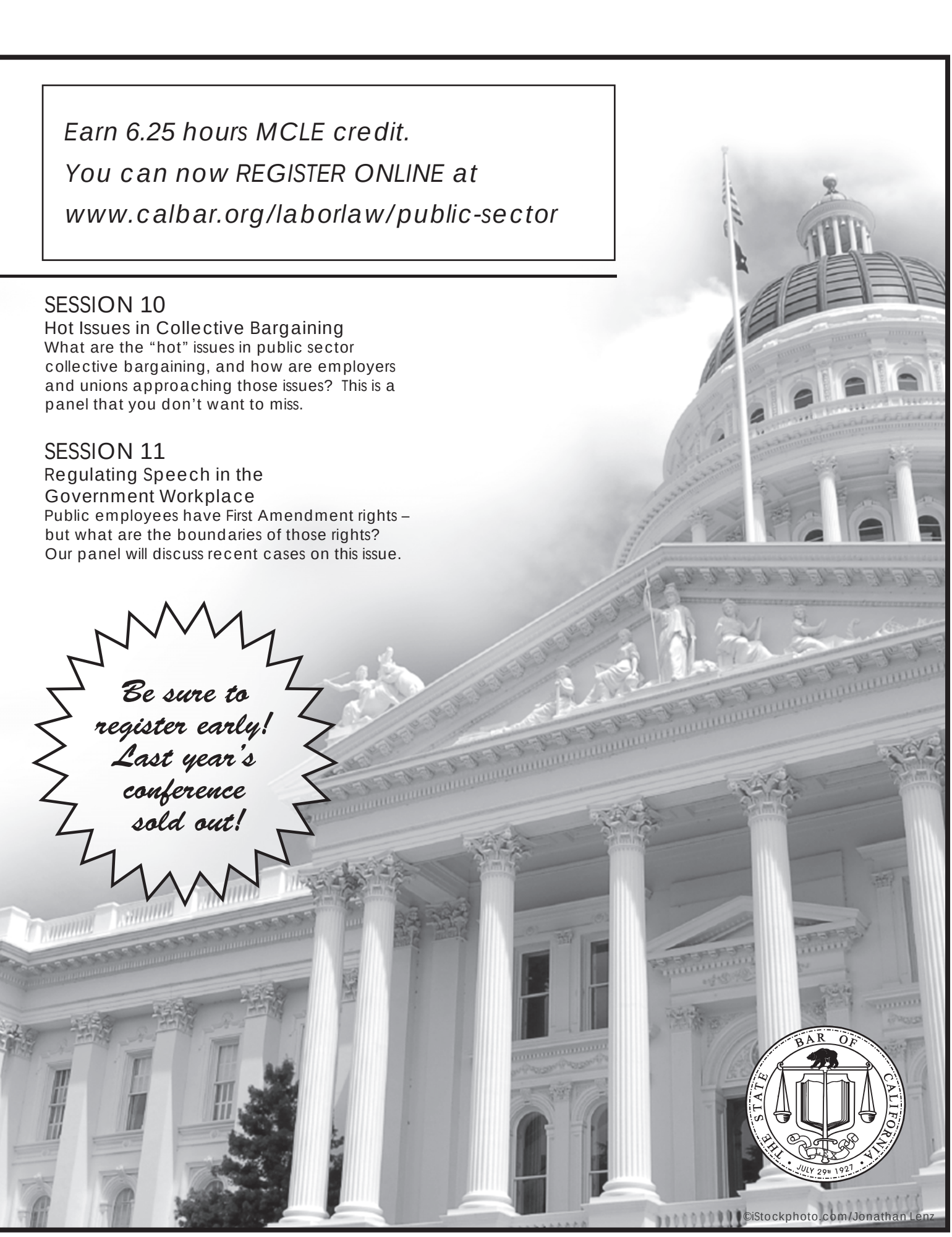
What are the "hot" issues in public sector collective bargaining, and how are employers and unions approaching those issues? This is a panel that you don't want to miss.

SESSION 11

Regulating Speech in the Government Workplace

Public employees have First Amendment rights – but what are the boundaries of those rights? Our panel will discuss recent cases on this issue.

Be sure to register early! Last year's conference sold out!



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Employment Law Case Notes

continued from page 6

Opportunity Commission (EEOC) in 1999 in which he alleged that ACSC had discriminated against him on the basis of his age. Thereafter, Wysinger's work environment changed—he was no longer invited to be on management committees or to apply for management positions; he was treated "coldly" and ignored at management meetings; ACSC ignored requests to accommodate his disabilities (lupus, a heart condition and rheumatoid arthritis); he received unfavorable job evaluations; and staff was transferred from his office, creating a hardship for Wysinger. The jury found that ACSC had retaliated against Wysinger because he had filed the EEOC complaint and that it had failed to engage in the interactive process in connection with Wysinger's disability—though the jury also found that ACSC had not discriminated against Wysinger on the basis of his disability or his age. The jury awarded Wysinger economic damages of $204,000, non-economic damages of $80,000, and punitive damages of $1 million. In addition, the trial court awarded attorney's fees to Wysinger in the amount of $978,791. The court of appeal affirmed the judgment, holding that substantial evidence supported the finding of retaliation and failure to engage in the interactive process.

Evidence Supported Whistleblower Retaliation Claim but Not Sexual Harassment

Mokler v. County of Orange, 157 Cal. App. 4th 121 (2007)

Pamela Mokler was employed as the executive director of Orange County's Office on Aging ("OoA"). Following her termination, she sued the county for breach of contract, wrongful termination, hostile work environment and unlawful retaliation under Labor Code section 1102.5 (the "whistleblower statute"). The jury awarded Mokler $14,089.60 in past economic damages and $1,681,823 in past and future emotional distress damages (which the trial court reduced to $125,000 if Mokler would not agree to a new trial on damages). Although the jury found in favor of Mokler on the sexual harassment/hostile work environment claim, it awarded her no damages on that claim. Both sides appealed. The court of appeal ordered the trial court to enter judgment in favor of defendants on the sexual harassment claim, holding that County Supervisor Chris Norby's acts vis-à-vis Mokler (making various rude and inappropriate comments and placing his arm around Mokler while rubbing against her breast) were not sufficiently severe or pervasive to establish a hostile work environment. The court found that substantial evidence supported Mokler's retaliation claim, which was based on her termination following her complaint to her supervisors that the county had engaged in illegal activity by reorganizing the OoA. Finally, the court affirmed the new trial order, holding that the non-economic damages were excessive in light of the fact that Mokler had no trouble finding a new job (two weeks later) and her reputation was not damaged.

UPS May Not Have Violated the ADA by Excluding Deaf Drivers Who Failed to Satisfy DOT Hearing Standard

Bates v. United Parcel Serv., 2007 WL 4554016 (9th Cir. Dec. 28, 2007) (*en banc*)

One of the requirements applied by UPS to those applicants seeking to drive the familiar brown "package cars" was that they pass the physical examination (including a hearing exam) that the Department of Transportation (DOT) requires of drivers of commercial vehicles of a gross vehicle weight rating (GVWR) of at least 10,001 pounds. (UPS's vehicles had a GVWR of 9,318 pounds or less.) Plaintiffs in this case (a class of deaf UPS applicants and employees) challenged the company's application of the DOT standard, which did not apply to the vehicles in question. The Ninth Circuit, sitting en banc, reversed the district court's judgment that was rendered in favor of plaintiffs because it had failed to analyze whether plaintiffs were "qualified individuals" capable of performing the "essential function" of safely driving a package car. The court overruled its earlier opinion in *Morton v. United Parcel Serv., Inc.,* 272 F. 3d 1249 (9th Cir. 2001), to the extent that that opinion imported into the analysis of an ADA claim the bona fide occupational qualification defense found in Title VII and the ADEA. Further, the court reversed the judgment with respect to plaintiffs' claim for violation of the Unruh Act on the ground that it does not incorporate the employment discrimination provisions found under Title I of the ADA.

Employee Who Was Convicted for Taking Bribes Could Be Kept Away From Employers' Money

United States v. Betts, 2007 WL 4355365 (9th Cir. Dec. 14, 2007)

Marcus Brandon Betts, who worked for TransUnion (one of the three major credit reporting agencies), took bribes to conspire with his co-defendants to falsely improve credit scores. According to the Ninth Circuit, "it was a kind of private sector ticket-fixing scheme." Betts falsified 654 credit histories, which generated about a million dollars in losses to lenders. He pled guilty to conspiracy but challenged some of the conditions of his supervised release, including a restriction that Betts "shall not be employed in any capacity wherein he has custody, control, or management, of his employer's funds, lines of credit, or any similar sources of money." Betts argued that the restriction was an abuse of discretion by the trial court because his crime did not involve stealing from his employer. The Ninth Circuit disagreed and held that "as an employee, he owed [TransUnion] a fiduciary duty of loyalty. An employee's duty of loyalty includes a duty to act solely for the interests of his employer within the business area for which he is employed, account to the employer for money received in connection with his work, and avoid undisclosed interests that might affect his conduct as an employee." *Cf. Otsuka v. Polo Ralph Lauren Corp.,* 2007 WL 3342721 (N.D. Cal. Nov. 9, 2007) (employer stated claim against employee for breach of duty of loyalty associated with allegedly fraudulent transactions).

Sales Representative's $480,000 Wrongful Termination Award Is Affirmed

Casella v. SouthWest Dealer Servs., Inc., 157 Cal. App. 4th 1127 (2007)

Zachary Casella was employed as a sales representative for SouthWest Dealer Services, which sells its aftermarket auto products to auto dealerships and helps

train auto dealership finance and insurance salespeople on how to promote and sell SouthWest's products. Casella moved from New York to California to accept the position. After his employment was terminated approximately five months later, Casella sued SouthWest for wrongful termination in violation of public policy, fraud, and fraudulent inducement in violation of Labor Code section 970. Casella alleged that his employment was terminated in retaliation for his having reported SouthWest's participation in some of its car dealership clients' fraudulent business practices known as "payment packing" (which involved dealership sales personnel quoting inflated monthly payment amounts in order to hide the true cost of aftermarket products). Casella also alleged that he was fraudulently induced to move to California to take the job because SouthWest had failed to disclose its involvement in these fraudulent activities. The jury found in favor of Casella, awarding him $240,000 in compensatory damages and $240,000 in punitive damages. The court of appeal affirmed the judgment on the grounds that Casella's public policy claim was "tethered" to Penal Code section 487 (criminal fraud) and that the section 970 verdict was supported by substantial evidence. Finally, the court affirmed an award of $12,500 in attorney's fees to Casella associated with his successful defense against SouthWest's cross-complaint for breach of contract—however, he could not recover any attorney's fees associated with the prosecution of his affirmative claims against SouthWest since he did not allege a breach of the contract that contained the prevailing-party attorney's fees provision.

Insurance Agency Agreement Was Terminable at Will

Bernard v. State Farm Mut. Auto. Ins. Co., 158 Cal. App. 4th 304

William Bernard had an insurance agency, representing certain State Farm insurance companies. Bernard alleged he was forced to resign when he was unable to carry out the physical requirements of the sales program following injuries he sustained in a car collision. Among other things, Bernard sued State Farm for breach of the implied covenant of good faith and fair dealing based on certain misrepresentations that allegedly had been made by his supervisors. The agency agreement in question provided that "You or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address." The court of appeal held that this provision rendered Bernard's employment terminable at will—even in the absence of more precise language. Therefore, Bernard's claim for breach of the implied covenant of good faith and fair dealing had been properly dismissed by the trial court.

Release Enforced as to Defamation and Overtime Claims—But Not Claim Under USERRA

Perez v. Uline, Inc., 157 Cal. App. 4th 953 (2007)

On the day that Brian Perez, a captain in the United States Marine Corps Reserves, returned to work after duty with the Reserves, his employment with Uline, Inc. was terminated. He was presented with a "Severance Agreement and Release," offering him severance in the amount of six weeks' salary in exchange for his execution of the release. The agreement stated that Perez had seven days to accept it and advised him "to consult with an advisor of his choice prior to executing it." On the seventh day, Perez signed the release. Perez subsequently sued Uline and three of its employees, alleging wrongful termination in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), breach of oral contract, defamation and failure to pay overtime in violation of the California Labor Code. The court of appeal enforced the release and affirmed dismissal of Perez's claims with the exception of the claim arising under USERRA, which expressly states that a contract may not limit the protections of the statute.

$1.1 Million in Attorney's Fees Awarded Following Recovery of $30,300 Discrimination Judgment

Harman v. City & County of San Francisco, 158 Cal. App. 4th 407

This case, which was originally filed in federal court in 1999, involved allegations of race and sex discrimination by Allen Harman and two other white males who were employed as airfield safety officers at the San Francisco International Airport. After the case went to trial, a jury awarded Harman $15,300 as damages for economic harm and another $15,000 for emotional distress. The trial court subsequently awarded Harman attorney's fees in the amount of $1.1 million. The court of appeal affirmed the award of substantially all of the attorney's fees that were awarded by the trial court notwithstanding the relatively small amount of the underlying judgment. *Cf. Engle v. Copenbarger & Copenbarger,* 157 Cal. App. 4th 165 (2007) (former legal assistant who accepted law firm's offer to compromise sexual harassment claims pursuant to Code of Civil Procedure section 998 was entitled to recover her attorney's fees on top of the settlement amount that was offered—because the offer failed expressly to exclude fees and costs).

Ranger Who Was Injured in Residence Provided by State Was Limited to Workers' Compensation Remedies

Vaught v. State of Cal., 157 Cal. App. 4th 1538 (2007)

Marck Vaught was employed as a resource ranger for the state of California (State). His position required him to be on call "all the time." As an inducement to accept the position, the State offered Vaught and his wife the use of a residence located in the district in which Vaught worked. Vaught subsequently slipped and fell in the bathroom of the residence, and sued the State for negligence and failure to make the house habitable for human occupation. Vaught's wife sued for loss of consortium. The trial court granted the State summary judgment on the ground that the Vaughts' claims were subject to the exclusive remedies provided by the Workers' Compensation Act. The court of appeal affirmed. *Cf. Millard v. Biosources, Inc.,* 156 Cal. App. 4th 1338 (2007) (general contractor had no duty of care to injured employee of subcontractor).

Labor and Employment Law Section

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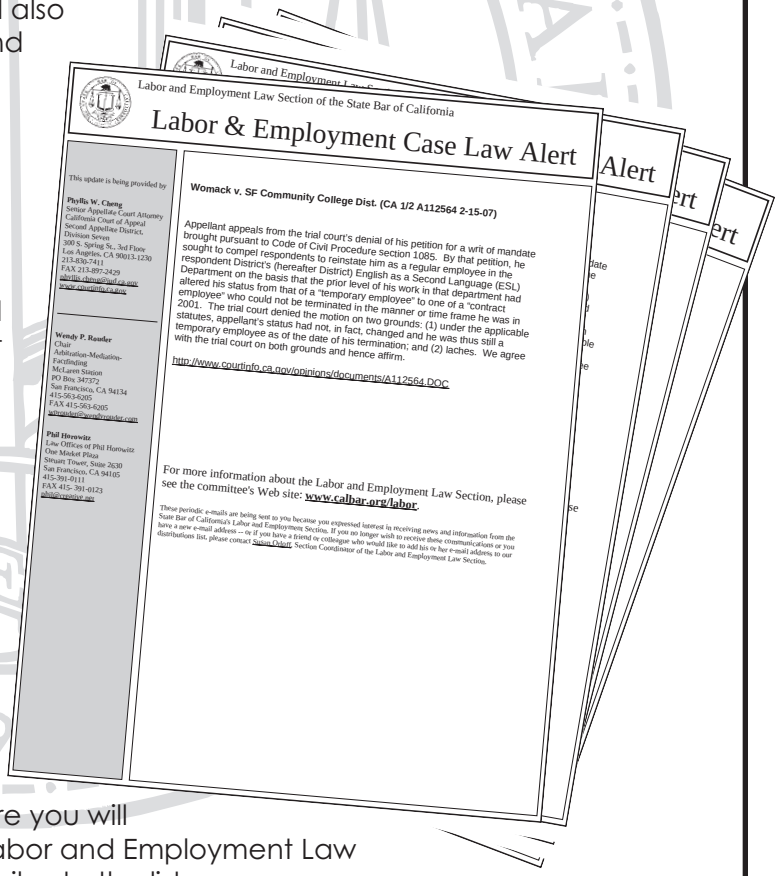
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Labor & Employment Case Law Alert

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Womack v. SF Community College Dist. (CA 1/2 A112564 2-15-07)

Appellant appeals from the trial court's denial of his petition for a writ of mandate brought pursuant to Code of Civil Procedure section 1085. By that petition, he sought to compel respondents to reinstate him as a regular employee in the respondent District's (hereafter District) English as a Second Language (ESL) Department on the basis that the prior level of his work in that department had altered his status from that of a "temporary employee" to one of a "contract employee" who could not be terminated in the manner or time frame he was in 2001. The trial court denied the motion on two grounds: (1) under the applicable statutes, appellant's status had not, in fact, changed and he was thus still a temporary employee as of the date of his termination; and (2) laches. We agree with the trial court on both grounds and hence affirm.

http://www.courtinfo.ca.gov/opinions/documents/A112564.DOC

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continued from page 9

many other factors weigh in favor of class resolution in wage and hour cases, including that current employees may not bring individual actions out of fear of retaliation, current employees might not know of their rights, and the necessity of class actions to give "teeth" to wage and hour laws. Further, the California Supreme Court has specifically held that an administrative action before the Labor Commissioner is an inadequate substitute for a class action.

Employees Must Plead and Prove That A Union Breached the Duty of Fair Representation in Order to Sue for Violation of a CBA Without Exhaustion of Grievance Procedures

Soremekun v. Thrifty Payless, Inc., 509 F.3d 978 (9th Cir. 2007)

Plaintiff Adediji Soremekun, a pharmacist, filed suit seeking wages for overtime work and bereavement leave, as well as penalties for failure to pay wages due at the time of his resignation, pursuant to the California Labor Code. Plaintiff's employment was governed by a collective bargaining agreement (CBA), which contained mandatory grievance procedures and a six-month statute of limitations for wage claims.

The district court granted the employer's motion for summary judgment, and the Ninth Circuit Court of Appeals affirmed. Under section 301 of the Labor Management Relations Act, employees may bring suit directly against an employer for violation of a CBA to vindicate "uniquely personal rights" such as wages and overtime pay, but must exhaust any mandatory grievance procedures provided for in the agreement. It was undisputed that Soremekun had not exhausted the CBA's grievance procedures. There was an exception to this exhaustion requirement where an employee could demonstrate that the union representing the employee had breached its duty of fair representation. The court found the exception did not apply here, as plaintiff had neither alleged nor proven that the union breached its duty to him with respect to his wage claim.

Plaintiff's state law claims for failure to pay wages due at the time of his resignation, based upon disputed wages for overtime and bereavement leave, also failed. The court found that the CBA contained a clear six-month statute of limitations for wage claims, and more than six months had passed since plaintiff's claims for unpaid wages had accrued.

Absent a Claim for Wages, the Statute of Limitations for Waiting Time Penalties Is One Year

McCoy v. Super. Ct. (Kimco Staffing Servs., Inc.), 157 Cal. App. 4th 225 (2007)

McCoy was the lead plaintiff in a putative class action seeking waiting time penalties under California Labor Code section 203 for defendant's alleged failure to timely pay final wages on completion of temporary work assignments in violation of sections 201 and 202. The complaint alleged that, instead of paying plaintiffs upon discharge or within seventy-two hours of resignation, defendant paid them on the next scheduled pay day. There was no dispute over the underlying wages.

The trial court granted defendant's motion to strike those portions of the complaint which sought waiting time penalties for the four-year period prior to the filing of the complaint, finding that because plaintiff sued for waiting time penalties only and not wages, section 203 did not apply.

Plaintiff's petition for writ of mandate challenging the trial court's order raised the issue of the precise meaning of section 203, which provides, "Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." Plaintiff raised several arguments to support the position that section 203 represented an exception to the default one-year statute of limitations for an action to recover a statutory penalty regardless of whether there was also a claim for the wages from which the penalties arose.

The appellate court found plaintiff's arguments unpersuasive concluding that for suits seeking penalties alone—as distinct from a suit seeking penalties *and* underlying wages—the objective of section 203, the legislative intent, and the common sense meaning of the section's language dictated a one-year statute of limitations. Because of this finding, the court did not address plaintiff's additional contention that the unfair competition law should extend the statute of limitations from three years to four years.

Anti-SLAPP in Employment Law

continued from page 1

> person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim.[9]

An anti-SLAPP analysis thus has two prongs: First, the defendant must show that a cause of action arises from an "act in furtherance of" the defendant's constitutional right of petition or free speech. Second, if that showing is made, then the burden shifts to the plaintiff to demonstrate, with admissible evidence, a probability of success on the merits.

The anti-SLAPP statute originally gave three examples of what was meant by an "act in furtherance" of the constitutional rights of petition or free speech, i.e., any oral or written statement: (1) made before a legislative, executive or judicial proceeding, or any other official proceeding authorized by law; (2) made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law; and (3) made in a place open to the public or a public forum in connection with an issue of public interest.[10]

In 1997, the anti-SLAPP law was amended to add a fourth, catch-all, category: "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." The 1997 amendment also added language to emphasize that the statute was to be "construed broadly."[11]

Procedurally, anti-SLAPP motions are filed early in the life of the litigation (generally within 60 days of service of the complaint) and heard early (within 30 days after the motion is filed).[12] Filing the motion stays discovery.[13] Moreover, the plaintiff may not attempt to moot, minimize or evade the motion by amending the complaint.[14] If the motion succeeds, the prevailing defendant is awarded attorneys' fees and costs.[15] And the plaintiff may not avoid an award of fees by dismissing the action before a ruling on the motion.[16] An order granting or denying an anti-SLAPP motion is immediately appealable,[17] and such an appeal stays the case.[18] All of these procedural aspects make the motion an especially attractive and potent tactic for defendants.

ANTI-SLAPP EXEMPTIONS ENACTED IN 2004

Anti-SLAPP motions became so popular that they created a new problem: The statute designed to address abusive SLAPP actions was, itself, being abused.[19] In response, the Legislature enacted Section 425.17, effective 2004, to curb the "disturbing abuse of Section 425.16."[20] This statute exempts from anti-SLAPP motions certain actions "brought solely in the public interest or on behalf of the general public,"[21] and certain actions brought against "a person engaged in the business of selling or leasing goods or services" (i.e., a commercial speech exemption).[22] These exemptions, however, are subject to certain conditions and – adding another layer of complexity – several exceptions.[23] Furthermore, the denial of an anti-SLAPP motion based on a statutory exemption is not appealable.[24] Because anti-SLAPP precedent developed for over a decade before these exemptions took effect, reliance on pre-2004 cases must be evaluated carefully in light of the statutory changes.

EMPLOYMENT-RELATED PROCEEDINGS AUTHORIZED BY LAW

Statements made "in connection with an issue under consideration or review by . . . any other official proceeding authorized by law" are subject to anti-SLAPP protection.[25] Investigations into workplace violence or sexual harassment often raise the issue of whether the investigation is an "official proceeding authorized by law" within the meaning of the statute.

A recent example in this area comes from the California Supreme Court's decision in 2006 in *Kibler v. Northern Inyo County Local Hospital District*.[26] Dr. Kibler was a physician who, after a series of hostile encounters with staff members, was brought before the hospital's peer review committee and summarily suspended.[27] Following his termination, he brought suit on a variety of theories, including defamation, abuse of process, and interference with his practice of medicine.[28] The hospital filed an anti-SLAPP motion, arguing that the hospital's peer review process was an "official proceeding."[29] The trial court granted the motion, and the decision was affirmed both by the court of appeal and the supreme court.[30]

In concluding that the review process fell within the anti-SLAPP statutes, the supreme court emphasized the "comprehensive scheme" by which the Business and Professions Code incorporates the peer review process into the overall process for the licensure of California physicians.[31] It also emphasized that the hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate.[32] Most notably, the court rejected arguments that "official proceedings authorized by law" were limited to proceedings before governmental entities, and thus, opened the door for other employee-review proceedings to qualify.[33]

THE PUBLIC ISSUE IN EMPLOYMENT DISPUTES

Even if the statements at issue are not made in an official proceeding, the anti-SLAPP statutes may apply if the statements are made "in connection with a public issue or an issue of public interest."[34] At first blush, whether an issue is of public interest may appear deceptively simple. Courts and commentators sometimes note that "judges and attorneys will, or should, know a public concern when they see it."[35] But the public issue requirement raises particular questions in the context of employment law. Litigants are apt to disagree not only on whether an issue is "public," but also on the threshold framing of the issue. For example, when a supervisor at a public university is accused of abusive behavior, is the issue whether one supervisor was abusive or does it relate to the broader issue of supervision throughout the university system?[36] When an employee reports sexual harassment by a supervisor, is the issue limited to one supervisor's alleged

conduct or does a larger issue arise regarding misconduct within the entire company?[37]

California decisions emphasize that the issue must be narrowly drawn with an emphasis on the speaker's specific conduct, rather than some "amorphous public interest."[38] One case provided the following analogy to underscore that the issue should be narrowly drawn:

> Blackacre sells a house to Whiteacre, and Whiteacre sues, claiming defendant misrepresented the square footage. Whiteacre brings a special motion to strike, claiming his speech involves a matter of public interest, because millions of Americans live in houses and buy and sell houses. [Plaintiff] correctly suggests that applying the anti-SLAPP statute in such a case would be absurd.[39]

In the employment context, courts generally reject attempts to implicate broad social issues, such as "negligent supervision generally" or "sexual harassment at the workplace," instead preferring to focus on the specific conduct and statements at hand.[40] Nonetheless, a broader characterization may prevail in some cases, as in the recent decision of *Morrow v. Los Angeles Unified School District.*[41]

In *Morrow* the Los Angeles Times reported that an inner-city high school principal would be replaced after criticism by school district officials over his handling of several student brawls attributed to racial tensions.[42] The article quoted two superintendents explaining that the principal would be replaced six months before his already-planned retirement, noting that the planned date for his retirement "did not fit with the district's needs" and would be "accelerated" based on his handling of the incidents.[43] The principal sued, alleging that the superintendents' statements to the press defamed him and invaded his privacy. The trial court granted the defendants' anti-SLAPP motion and dismissed the case.[44]

In attacking the anti-SLAPP ruling on appeal, the principal argued that "the challenged statements did not concern the student violence, but merely revealed matters of private interest—his retirement plans and the reasons for a personnel action."[45] The court of appeal, however, was unwilling to sever the statements about the principal's retirement plans from the context giving rise to those statements, that is, the incidents of campus violence.[46] "While it is possible to imagine an instance in which a school administrator's retirement plans would be of purely private interest," that was not the case in *Morrow,* where the statements were made in response to the principal's handling of "serious incidents" that indisputably were legitimately newsworthy matters of public interest.[47]

A similar recent case, *McGarry v. University of San Diego,* involved statements surrounding a private university's termination of its football coach.[48] The coach sued the university and two of its officials for defamation based on statements about his termination published in the San Diego Union Tribune.[49] The defendants successfully brought an anti-SLAPP motion and the coach appealed. The court recognized that the coach had held a high-profile position in the community and his abrupt termination in the middle of a successful season and on the eve of an important game was an important issue to a substantial segment of the public, including the University's current students, its alumni, potential recruits, and other schools in the league. The court also rejected the coach's argument that although the fact of his employment termination may have been a public issue, "the *reasons* for his termination were private and confidential matters."[50] The court viewed this as a distinction without a difference, noting that "it is difficult to imagine a greater 'closeness' between the topic of the public interest (the termination) and the challenged statements (the *reasons* for the termination)."[51]

By contrast, some cases in the employment context simply fail to attain a required level of public significance to persuade a court that a "public issue" is at stake. For example, in *Du Charme v. International Brotherhood of Electrical Workers,* a former employee sued for wrongful termination and defamation after the employer (a union) posted an explanation of the termination on its website—that he had been "removed from office for financial mismanagement."[52] The trial court denied the employer's anti-SLAPP motion, finding that the statement

Anti-SLAPP Update

In the employment context, nearly all reported anti-SLAPP decisions have arisen when employer-defendants bring the motion. After this article went to print, a new case issued showing how anti-SLAPP laws can be used by former employees against employers. In *Nygård, Inc. v. Uusi-Kerttula*, __ Cal. App. 4th __ (Feb. 1, 2008), after Nygård terminated Mr. Uusi-Kerttula's employment, he gave a negative interview about his "horrible" work experiences at Nygård to a Finnish magazine, prompting Nygård to sue its former employee for breach of contract, defamation and other claims. The trial court granted the former employee's anti-SLAPP motion, and the court of appeal affirmed. The court found that the published interview statements were made in a public forum and involved a highly visible public figure and issues of public interest. Apparently the owner of Nygård – a prominent businessman and celebrity of Finnish extraction – is of great public interest among the Finnish public, which the court found sufficient to satisfy the first prong. On the second prong, the court found that the published statements did not violate the employee's confidentiality agreement because the statements concerned only his personal experiences working for the company and not sensitive economic information (e.g., trade secrets or financial data), and Nygård failed to make a prima facie case establishing the falsity of the statements because the statements were rhetorical hyperbole. Although the facts of *Nygård* are somewhat unique, employers should be aware of this opinion as former employees no doubt will rely on it when defending against defamation claims. In an unpublished decision in a companion appeal, the employee was awarded $45,000 in attorney fees for successfully bringing the motion.

posted on the website was neither a matter of public interest nor made in connection with an official proceeding. The employer appealed, but the court of appeal affirmed, concluding that the statement did not concern a public issue because it was "unconnected to any discussion, debate or controversy."[53] The statement on the website did not urge members of the union to take a position on the matter, but rather, was a "mere informational statement."[54] As such, protecting the statement "would in no way further the statute's purpose of encouraging *participation* in matters of public significance."[55]

Both *Du Charme* and *Rivero v. Am. Federation of State, County and Municipal Employees, AFL-CIO* (discussed in endnote 55) peripherally implicate the topic of organized labor, because in both instances the employers were unions. As such they raised the question whether involvement of a union invokes First Amendment rights per se. The argument raised by the unions in those cases drew from analogy to longstanding federal law that recognizes the public nature of labor disputes, applying the heightened "actual malice" standard to labor speech, ostensibly to "encourage free debate on issues dividing labor and management."[56] The courts rejected the argument, noting that if organized labor inherently implicated the public-issue prong, "discussion of nearly every workplace dispute would qualify as a matter of public interest."[57] To avoid that result, the court of appeal in *Rivero* concluded that "unlawful workplace activity below some threshold level of significance is not an issue of public interest, even though it implicates a public policy."[58] Also worth noting is that in *Rivero,* the defendant argued that the matter was sufficiently significant because the plaintiff worked at a publicly financed institution.[59] In rejecting that argument, the court noted that without a threshold of significance "the theft of a single pencil" would amount to a public issue.[60]

The procedural advantages of California's anti-SLAPP law are so significant that any employee or employer involved in a lawsuit should carefully consider how a special motion to strike on anti-SLAPP grounds may affect the litigation. Even where an employee was not in the public eye, if the employee's conduct could affect a large number of people beyond the direct participants or if the statements at issue concerned a topic of widespread public interest, the public-issue criteria might be satisfied. The boom in both employment litigation and anti-SLAPP decisions ensures that these areas will continue to overlap. Becoming and remaining conversant in California's anti-SLAPP law is essential for labor and employment litigators.

ENDNOTES

1. Cal. Code Civ. Proc. §§ 425.16, 425.17, 425.18.
2. James S. Moneer, *Two SLAPPS Don't Make a Right: But They Do Clog Our Courts,* 20:1 Cal. Litig. 16, 21 (2007); Sharon J. Arkin, *Bringing California's Anti-SLAPP Statute Full Circle,* 31 W.St.U.L.Rev. 1, 2 (Fall 2003).
3. What follows is a cursory overview of the origins and development of California's anti-SLAPP law. Readers should carefully review the statutes, cases, law review articles, and practice guides for more detailed analysis. E.g., 1 Kiesel, Lichtman, Matthai & Seabolt, Cal. Civ. Proc. Before Trial, chapter 13 (Matthew Bender); 5 Witkin, Cal. Proc. §§ 962–964; Weil & Brown, Civ. Proc. Before Trial, chapter 7.
4. Pring & Canan, *Strategic Lawsuits Against Public Participation,* 35 Soc. Problems 506 (1988).
5. *Wilcox v. Superior Court,* 27 Cal. App. 4th 809, 815 (1994).
6. *Id.* at 816.
7. Cal. Code Civ. Proc. § 425.16(a).
8. *Varian Med. Systesms, Inc. v. Delfino,* 35 Ca1.4th 180, 193 (2005).
9. Cal. Code Civ. Proc. § 425.16(b).
10. *Id.* at § 425.16(e)(1), (2), & (3).
11. *Id.* at § 425.16(a) (last sentence); *Briggs v. Eden Council for Hope & Opportunity,* 19 Ca1. 4th 1106, 1135 (1999) (Baxter, J., concurring and dissenting).
12. Cal. Code Civ. Proc. § 425.16(f).
13. *Id.* at § 425.16(g) (also noting that a plaintiff may overcome the discovery stay with a showing of good cause). This discovery freeze, however, does not apply in federal court. *Metabolife Int'l, Inc. v. Wornick,* 264 F.3d 832, 846 (9th Cir. 2001).
14. *Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc.,* 122 Cal.App.4th 1049, 1055 (2004).
15. Cal. Code Civ. Proc. § 425.16(c). In 1993 this section was amended to allow attorneys' fees and costs to a plaintiff who defeats an anti-SLAPP motion if the motion is "frivolous or is solely intended to cause unnecessary delay."
16. *Liu v. Moore,* 69 Cal. App. 4th 745, 749–53 (1999).
17. Cal. Code Civ. Proc. §§ 425.16(i); 904.1(a)(13). Originally only the granting of an anti-SLAPP motion was appealable. But in 1999 the Legislature equalized appellate rights by amending the statute to provide that the denial also was appealable. Note also that an anti-SLAPP ruling is appealable in federal court too under the collateral order doctrine. *Zamani v. Carnes,* 491 F. 3d 990, 994 (9th Cir. 2007).
18. *Varian,* 35 Ca1. 4th at 188–91; but see *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.,* 143 Cal. App. 4th 1284, 1302 (2006) (stay does not prevent trial court from ruling on preliminary injunction).
19. Success in anti-SLAPP motions also has led to litigation by victorious defendants—typically for malicious prosecution or abuse of process—against the SLAPPer and the SLAPPer's attorneys. These SLAPPback lawsuits are also subject to anti-SLAPP motions. Recognizing that SLAPPbacks are "distinguishable in character and origin" than ordinary malicious prosecution claims, in 2005 the Legislature enacted Code of Civil Procedure section 425.18, which outlines special rules for anti-SLAPP motions in SLAPPbacks. In particular, there are differences regarding the timing of the motion; the discovery stay; the recoverability of fees and costs; and the appellate rights. See Cal. Code Civ. Proc. § 425.18.
20. Cal. Code Civ. Proc. § 425.17(a).
21. *Id.* at § 425.17(b).
22. *Id.* at § 425.17(c).
23. *Id.* at § 425.17(b)(1–3), (c)(1–2), (d)(1–3).
24. *Id.* at § 425.17(e).
25. *Id.* at § 425.17(e)(1)-(2).
26. 39 Ca1. 4th 192 (2006).
27. *Id.* at 194.
28. *Id.* at 195.
29. *Id.*
30. *Id.*

31. *Id.* at 196.
32. *Id.* at 197.
33. *Id.* at 198; *see also Vergos v. McNeal*, 146 Cal. App. 4th 1387, 1399 (2007) (resolution process for sexual harassment claims constitutes "official proceeding authorized by law"). *Vergos* stands in contrast to *Olaes v. Nationwide Mut. Ins. Co.*, 135 Cal. App. 4th 1501 (2006), a pre-*Kibler* decision in which the court of appeal concluded that a sexual harassment dispute resolution proceeding did not constitute an "official proceeding" because it was non-governmental in nature. *Id.* at 1508.
34. Cal. Code Civ. Proc. § 425.16(e).
35. *Du Charme v. Int'l Bhd. of Elec. Workers*, 110 Cal.App.4th 107, 117 (2003).
36. *Rivero v. Am. Federation of State, County and Municipal Employees, AFL-CIO*, 105 Cal. App. 4th 913, 925 (2003) (rejecting the broad characterization of the issue).
37. See, e.g., *Olaes v. Nationwide Mut. Ins. Co.*, 135 Cal. App. 4th 1501 (2006); *Carpenter v. Jack in the Box Corp.*, 2005 Cal. App. Unpub. LEXIS 3679, *10-*11.
38. *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1132–33 (2003).
39. *Consumer Justice Center v. Trimedica Int'l, Inc.*, 107 Cal. App. 4th 595, 601 (2003).
40. *Rivero,* 105 Cal. App. 4th at 925; *Olaes*, 135 Cal.App.4th at 1510.
41. 149 Cal. App. 4th 1424.
42. *Id.* at 1429.
43. *Id.*
44. *Id.*
45. *Id.* at 1436–37.
46. *Id.*
47. *Id.* at 1436. According to the Los Angeles Times account: "The first brawl involved about 100 students near the cafeteria. Three students were hurt. In the second, more than 100 [B]lack and Latino students got into another lunchtime fight that officials said had links to a gang dispute." *Id.*
48. 154 Cal. App. 4th 97, 102–03 (2007).
49. *Id.*
50. *Id.* at 109.
51. *Id.* at 110; *see also Fontani v. Wells Fargo Investments*, 129 Cal.App.4th 719, 725 (2005) (a form submitted to the National Association of Securities Dealers fell within the anti-SLAPP statute, both as a public issue and as an "other proceeding authorized by law"). *Fontani* was disapproved of by the Supreme Court in *Kibler*, 39 Ca1.4th at 199 n.5, to the extent it implied that to qualify as an official proceeding the proceeding must be one that exercises governmental power.
52. 110 Cal. App. 4th 107, 113–14, 119 (2003).
53. *Id.* at 118.
54. *Id.*
55. *Id. Rivero*, 105 Cal. App. 4th 913, is a similar case. In *Rivero*, a supervisor of a staff of eight custodians brought suit against a union that had published three documents containing allegations that he had engaged in abusive behavior towards employees. *Id.* at 916–17. The court concluded that the entire matter fell beneath a threshold level of significance required for the publications to constitute a public issue, within the meaning of the anti-SLAPP statute. *Id.* at 924.
56. *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 62 (1966).
57. *Rivero*, 105 Cal. App. 4th at 924.
58. *Id.*
59. *Id.* at 924–25.
60. *Id.* By contrast, see *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees*, 69 Cal. App.4th 1057 (1999) (two housekeepers allegedly fired for meeting to discuss forming a union constituted a public issue).

MCLE Self-Assessment Test

MCLE CREDIT
Earn one hour of general MCLE credit by reading "***The Employment Lawyer's Guide to California Anti-SLAPP Law***" 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:

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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.***

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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.

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1) To succeed on an anti-SLAPP motion, the defendant bears the burden to demonstrate, with admissible evidence, that the suit has no probability of success on the merits.
❑ True ❑ False

2) The favored causes of action in SLAPP lawsuits are defamation, interference with prospective economic advantage, nuisance, and infliction of emotional distress.
❑ True ❑ False

3) In effect since 1993, California's anti-SLAPP statute is Code of Civil Procedure section 425.16.
❑ True ❑ False

4) Under Code of Civil Procedure section 425.16, a special motion to strike may be brought by a defendant who is being sued as a result of an act conducted "in furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue . . . ."
❑ True ❑ False

5) To succeed on an anti-SLAPP motion, the defendant must show that a cause of action arises from an act in furtherance of the defendant's constitutional right of petition or free speech.
❑ True ❑ False

6) The anti-SLAPP statute gives the following four examples of what Code of Civil Procedure section 425.16 means by the phrase "act in furtherance": (a) any oral or written statement made before a legislative, executive or judicial proceeding, or any other official proceeding authorized by law; (b) any oral or written statement made in connection with an issue being considered or reviewed by a legislative, executive or judicial body, or any other official proceeding authorized by law; (c) any oral or written statement made in a place open to the public or a public forum in connection with an issue of public interest; and (d) any other conduct in the furtherance of the exercise of the constitutional right of petition or right of free speech in connection with a public issue or an issue of public interest.
❑ True ❑ False

7) As amended in 1997, the anti-SLAPP statute must be construed narrowly.
❑ True ❑ False

8) An anti-SLAPP motion to strike a lawsuit is made in the latter stages of litigation.
❑ True ❑ False

9) In California superior court, filing an anti-SLAPP motion does not stay discovery.
❑ True ❑ False

10) A plaintiff may not attempt to avoid a defendant's anti-SLAPP motion by amending the plaintiff's complaint.
❑ True ❑ False

11) If the anti-SLAPP motion to strike succeeds, the prevailing defendant is awarded attorneys' fees and costs.
❑ True ❑ False

12) An order granting or denying an anti-SLAPP motion is not immediately appealable.
❑ True ❑ False

13) Effective 2004, Code of Civil Procedure section 425.17 exempts from anti-SLAPP motions certain actions "brought solely in the public interest or on behalf of the general public," as well as certain actions brought against "a person engaged in the business of selling or leasing goods or services."
❑ True ❑ False

14) The exemptions of Code of Civil Procedure section 425.17 are not subject to any exceptions.
❑ True ❑ False

15) Given the enactment of Code of Civil Procedure section 425.17, pre-2004 cases must be evaluated carefully.
❑ True ❑ False

16) A private hospital's peer review process does not constitute an "official proceeding authorized by law," because it is not a government proceeding.
❑ True ❑ False

17) In the employment context, for determining whether or not an anti-SLAPP motion should be granted, the court generally broadly examines the issue of statements made "in connection with a public issue or an issue of public interest," looking beyond the specific conduct of the person who made the statements.
❑ True ❑ False

18) In a 2007 published opinion, the state court of appeal held that, for anti-SLAPP purposes, a plaintiff-principal's retirement plan was a matter of public interest where two superintendents of defendant-school district had told the press that the principal's planned retirement would be accelerated because of how the principal handled student fights attributed to racial tensions.
❑ True ❑ False

19) The denial of an anti-SLAPP motion was overturned where a former employee sued the employer for wrongful termination and defamation after the employer posted on its website a statement that the employee was "removed from office for financial mismanagement."
❑ True ❑ False

20) Defendant-union's publication of three documents containing allegations that plaintiff-supervisor was abusive toward eight custodian employees was held to constitute a public issue for anti-SLAPP purposes.
❑ True ❑ False

Message from the Chair

By Phil Horowitz

Phil Horowitz is past Chair and current Board member of the California Employment Lawyers Association. He volunteer teaches trial advocacy at the University of San Francisco and Stanford Law Schools. Mr. Horowitz has his own San Francisco law firm, representing employees.

Education is our Section's mission. I'm happy to report that our Section has a lot of great educational events coming up.

Our Section's 14th Annual Labor and Employment Public Sector Conference will be held at the Radisson Hotel in Sacramento on Friday, April 11. Our Public Sector Conference is without a doubt the premier educational conference each year on California public sector labor and employment law.

A recent survey of the 7,000 or so members of the State Bar's Labor and Employment Law Section shows that 42 percent of us do public sector work as part of our practice. Indeed, a quarter of us do nothing but public sector work.

Whether you already practice public sector law, or you are just thinking about getting started, I would like to personally and heartily invite you to our Section's 14th Annual Labor and Employment Public Sector Conference.

This year's conference promises to be even better than ever. There will be the usual fast-paced annual update, and then a whole selection of concurrent sessions.

Topics range from bringing and defending against writs to regulating speech in the government workplace, from wage and hour law in the public sector to hot issues in collective bargaining, from modifying employee and retiree health care benefits to . . . well, you get the idea.

By the way, our Section proudly authors the definitive treatise California Public Sector Labor Relations, published by Matthew Bender. If you practice in this area of law and don't already own this book, you should order your copy today. Practitioners in the field call this book "essential."

Our Section also has a number of new seminars coming up that you should know about. Most of us handle disability discrimination issues. This year, our Section is presenting a series of lunchtime seminars on disability discrimination. There will be a seminar on discovery in disability discrimination cases on May 28 (in San Francisco) and on June 4 (in Los Angeles). That discovery seminar will be followed up with a seminar on using experts in disability discrimination cases on July 16 (in Los Angeles) and July 23 (in San Francisco).

There are also other short seminars coming up on other topics. We'll be presenting a seminar on wage and hour issues in the retail industry in Los Angeles on May 7. On June 9, there will be a seminar in San Francisco on the legal path in dealing with emotionally disturbed employees. We are presenting a seminar on sexual harassment prevention training on July 11 in Newport Beach.

The Labor and Employment Section puts on great conferences and seminars. We look forward to seeing you at one soon.

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 we count on you to provide us with the variety of viewpoints representative of more than 6,000 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. Thank you for all of your high quality submissions to date, and please…keep them coming! Please e-mail your submission to Section Coordinator Susan Orloff at susan.orloff@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 proofreading their submissions. Articles should be no more than 2,500 words. Please follow the style in the most current edition of *The Bluebook: A Uniform System of Citation* and put all citations in endnotes.

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