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CALIFORNIA LAYOFF BASICS—TWO PERSPECTIVES



Overall layoffs are at record numbers, and estimates show that they will continue to increase. Any termination of employment can carry the risk that it will trigger discrimination claims. But layoffs—by their very size and nature—can significantly increase the risks for potential violations of discrimination laws under California's Fair Employment and Housing Act (FEHA). This article is designed to provide insight to counsel for both employees and employers about how to effectively navigate through layoffs and offers tips about how to avoid discrimination claims.

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The California Department of Fair Employment and Housing (DFEH) is the California agency charged with investigating and prosecuting violations of the Fair Employment and Housing Act (FEHA),² California's landmark civil rights law that prohibits discrimination in employment, housing, and public accommodations. The employment provisions of the FEHA are older and provide broader protections than their federal counterpart, Title VII of the 1964 Civil Rights Act.³ Throughout 2009, the DFEH celebrates the fiftieth anniversary of this civil rights law, which prohibits California employers from considering a protected characteristic such as age, disability, national origin, race, religion, or sex when making employment decisions, including

Layoffs have proven to be a significant tool for businesses to cope with the current economic environment. In California, however, layoffs are considered an adverse employment action that can trigger state and federal discrimination claims. Under the leadership of Phyllis Cheng, the DFEH has engaged in unprecedented outreach—from youtube.com videos to email updates—and the result is a greater awareness about rights and obligations under the FEHA. Thus, record layoffs are occurring at a time when there likely is record awareness of anti-discrimination laws. It therefore is no surprise that there has been a significant jump—far greater than historical annual increases—in the percentage of claims filed with the DFEH. The clear message to employers is that if layoffs are

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MCLE Self-Study

The *Pyett* Decision: A Major Shift in Doctrine, but Limited Impact

By Barry Winograd

In *14 Penn Plaza LLC v. Pyett*¹ (*Pyett*) the United States Supreme Court held that an individual could be compelled under federal law to arbitrate an age discrimination claim based on a union's clear waiver in a collective bargaining provision of its members' right to litigate their claims in court. The Court's decision all but overruled its 35-year-old precedent in *Alexander v. Gardner-Denver Co.*² (*Gardner-Denver*), *Pyett* also signaled a major shift in doctrine, but it left many legal and practical questions unanswered. Its long-term impact most likely will be limited.

The plaintiffs in *Pyett* were three unionized night security employees who worked in a New York City office building. In 2003, with their union's consent, the building owners hired a new security contractor for certain services, and reassigned the employees to work elsewhere in the building. The workers, all older individuals with decades of seniority, believed the new assignments were more difficult and that overtime was diminished.

The union grieved under a multi-party collective bargaining agreement (CBA) involving a local affiliate of the Service Employees International Union and New York's Realty Advisory Board. The union's grievance initially raised an age discrimination claim along with reassignment and overtime issues. Soon after the arbitration began before an arbitrator appointed under the CBA, the union withdrew the age discrimination charge. The CBA arbitrator eventually ruled against the union.

The union reportedly told the workers that it could not pursue the age discrimination claim because the union had itself agreed to the new security contractor that led to the employees' removal from their previous positions.

Once the union dropped the discrimination claims, the employees declined the company's request that the CBA arbitrator hear their dispute. Instead, the employees filed a federal lawsuit challenging the building company's actions.

The company resisted the federal suit, contending that the CBA contained broad language compelling arbitration of discrimination claims as the employees' "sole and exclusive" remedy.³ Both the district court and the Second Circuit Court of Appeals rejected the company's position, relying on the longstanding *Gardner-Denver* decision as a legal bar to labor and management negotiating a waiver of an individual's right to bring a discrimination lawsuit. The Supreme Court granted certiorari to consider whether "a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate [age discrimination] claims is enforceable as a matter of federal law."⁴

In a five-four decision, the Court answered "yes"—arbitration could be enforced. Writing for the majority, Justice Clarence Thomas began his analysis by noting that arbitration provisions are a mandatory subject of bargaining under the National Labor Relations Act (NLRA), and that coverage of individual discrimination claims could be negotiated.⁵

Nor did the majority see any bar to arbitration of claims under the federal age discrimination statute, finding that the Court's 1991 decision enforcing an employee's individual arbitration agreement in *Gilmer v. Interstate/Johnson Lane Corp.*⁶ was controlling.⁷ As the majority emphasized, the change in forum from the courtroom to arbitration was not a prospective waiver that modified an employee's substantive right

to protection against discrimination.

Last, the Court concluded that the CBA provision in *Pyett*, unlike the clause at issue in a 1998 decision, *Wright v. Universal Maritime Service Corp.*,⁸ should be treated as a clear and unmistakable waiver of an employee's right to pursue individual relief in court.⁹ Thus, as matters stand after *Pyett*, only an explicit waiver in a CBA will bar a worker's lawsuit.

Driving the analysis in *Pyett* was a line of decisions in the 1980s and 1990s that represented a judicial turnaround on the enforcement of arbitration agreements under the Federal Arbitration Act (FAA).¹⁰ For many years, the Supreme Court had been critical of compelling arbitration as a substitute for litigation, at least absent persuasive evidence of a voluntary agreement to arbitrate. In *Pyett*, Justice Thomas wrote that this history, exemplified in the case of *Wilko v. Swan*,¹¹ was superceded by a later, more favorable understanding of arbitration under the FAA.¹²

Gardner-Denver, decided in 1974, remained outside of this trend given its distinct roots in the realm of collective bargaining, an area of federal law subject to its own national rules governing the enforcement of labor-management arbitration agreements under section 301 of the Labor-Management Relations Act.¹³ This doctrine, brought to full flower in the *Steelworkers Trilogy* of cases in 1960,¹⁴ views labor arbitration as a substitute for the economic weapon of the right to strike, not as a substitute for litigation.¹⁵

In *Gardner-Denver*, the Court found that a labor arbitration award which upheld the worker's discharge did not preclude an employee's subsequent race discrimination lawsuit.¹⁶ Justifying this

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California Supreme Court Clarifies When State Civil Service Employees May File a Whistleblower Complaint

By Bruce Monfross



Bruce Monfross is currently employed as an attorney with California's Office of the Inspector General. Prior to that, he was employed as an attorney with California's State Personnel Board for several years, where one of his duties involved reviewing and processing whistleblower retaliation complaints. He has provided representation to both employees and employers in both the private and public sector in employment-related matters since 1995.

INTRODUCTION

California's Whistleblower Protection Act (CWPA)¹ was significantly amended on January 1, 2000, to strengthen protections for state civil service employees and applicants for state civil service employment who claim they have been subjected to improper personnel actions because they engaged in whistleblowing activities. Unfortunately, while the significant amendments to the CWPA have greatly enhanced the protections provided to whistleblowers, the statutory scheme has also been criticized, with some justification, for containing a number of vague and nebulous provisions that have proven difficult to interpret and administer. One of the CWPA's seemingly hazy provisions—concerning at what point, if any, does a whistleblower possess the right to file a civil complaint in Superior Court concerning her allegations—has been recently addressed by the California Supreme Court in *State Board of Chiropractic Examiners v. Superior Court (Arbuckle)*.²

THE CALIFORNIA WHISTLEBLOWER PROTECTION ACT

State civil service employees and applicants for state employment who believe that they have been retaliated against for having engaged in activities protected under the CWPA may file a complaint with California's State Personnel Board (SPB) pursuant to Government Code sections 8547.8 and 19683.³ The complaint must be filed with the SPB within twelve months of the most recent alleged act of retaliation.⁴

In order to establish a claim for whistleblower retaliation, a complainant must prove, by a preponderance of the evidence, that she has been retaliated against as a result of having made a protected disclosure of an improper governmental activity or a condition that

may significantly affect the health and safety of employees or the public.⁵ If a complainant meets her burden, the alleged retaliator(s) must then demonstrate, by clear and convincing evidence, that the alleged retaliatory acts were justified on the basis of evidence separate from the fact that the complainant made a protected disclosure.⁶

Upon exercising jurisdiction over a whistleblower retaliation complaint, the SPB usually either assigns the complaint to a "Notice of Findings" review process by the Executive Officer or consolidates the complaint with another case pending before it and assigns the matter for an administrative evidentiary hearing before an administrative law judge (ALJ).⁷ For those complaints assigned to the Notice of Findings process, the Executive Officer is required to issue his or her findings concerning the complaint within sixty working days of the SPB exercising jurisdiction over the complaint.⁸

In addition to filing a complaint with the SPB, a complainant may also file a civil complaint in superior court concerning her allegations of whistleblower retaliation. More specifically, Government Code section 8547.8, subdivision (c) provides:

In addition to all other penalties provided by law, any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable

attorney's fees as provided by law. *However, any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the State Personnel Board pursuant to subdivision (a), and the board has issued, or failed to issue, findings pursuant to Section 19683.* (Emphasis added.)

One of the primary disputes concerning the proper interpretation of the CWPA has centered around when and whether a complainant may file a civil complaint in superior court. That issue has now been answered, at least to a degree, by the California Supreme Court in *Arbuckle*.

In 2001, Carole Arbuckle was employed as a Management Services Technician with California's State Board of Chiropractic Examiners (SBCE), where her job duties included identifying chiropractors subject to citation for practicing with an expired license. Arbuckle identified a particular chiropractor who was subject to such a citation, but the SBCE Executive Director instructed her not to issue it, despite Arbuckle's persistent inquiries.

As a result of her interactions with the Executive Director concerning the non-issuance of a citation, Arbuckle claimed that she experienced a stressful work environment, including numerous indignities, disputes, and acts of favoritism, all of which culminated in a breakdown in the relationship between Arbuckle and the Executive Director. SBCE managers thereafter reportedly changed Arbuckle's job duties, denied her requests for a modified work schedule and a light-duty assignment, cancelled her alternative work schedule, and transferred her to a different unit.

In 2002, Arbuckle filed a whistleblower retaliation complaint with

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When the FEHA and Arbitral Statutes of Limitation Collide: *Pearson Dental Supplies, Inc.*

By Joel M. Grossman

The California Supreme Court, having granted review in *Pearson Dental Supplies, Inc. v. Superior Court*,¹ is set to determine what happens when an arbitration agreement provides for a limitations period shorter than the one set forth in a statute, such as the Fair Employment and Housing Act (FEHA).²

In *Pearson*, the parties entered into an arbitration agreement which required that any claims arising out of the employment relationship be brought within one year of the date the dispute arose, or the date on which the employee first became aware of the facts giving rise to the dispute. The FEHA, by contrast, gives a claimant one year in which to file an administrative charge with the agency and one additional year in which to file a lawsuit once the agency issues a right-to-sue notice.³ In other words, an employee who believes he was terminated for a discriminatory reason would have up to two years to initiate a civil action under the FEHA, while under the arbitration agreement at issue in *Pearson*, the aggrieved employee would have only one year to institute a claim in arbitration. The central question raised in the case is whether the imposition of a shorter limitations period in the arbitration agreement deprives the employee of a statutory right, and thereby invalidates the arbitration agreement.

The procedural background is quite complex, and for purposes of this article will not be summarized in full. Plaintiff Luis Turcios, while employed by defendant Pearson Dental Supplies, executed a Dispute Resolution Agreement (DRA), which required Turcios to submit any claims arising out of his employment to arbitration. It further stated that any claim not submitted to binding arbitration within one year of its occurrence would be deemed waived and invalid. In other words, regardless of the statute of limitations which might apply

in superior court, any employment-related claim brought under the DRA had a one-year statute of limitations.

Pearson terminated Turcios' employment on January 31, 2006. A little over two months later, on April 5, 2006, Turcios filed an administrative complaint with the Department of Fair Employment and Housing (DFEH), alleging that his termination was due to age discrimination. At Turcios' request, the DFEH issued a right-to-sue letter a few days later, on April 14, 2006. Thus, under the FEHA's limitations period, Turcios would have had until April 13, 2007 in which to file a civil action for age discrimination in violation of the FEHA. Turcios did not wait that long. He filed a lawsuit in court under the FEHA on October 2, 2006, well within the FEHA's statute of limitations and the one-year limitations period set forth in the DRA.

Defendant Pearson did not initially seek to compel arbitration. Rather, Pearson actively litigated the matter in court for several months. Indeed, while Pearson filed an answer to the complaint, asserting thirty-one affirmative defenses, it did not assert that the DRA required the matter to be arbitrated. Pearson first brought up the DRA at a case management conference on February 20, 2007, more than four months after the complaint was filed, and about three weeks after the DRA's statute of limitations had run. On March 13, Pearson formally filed a petition to compel arbitration, which the court granted over Turcios' objection.

Once the matter was in arbitration, Pearson moved for summary judgment on the ground that the claim had not been timely submitted to arbitration under the one-year statute of limitations created by the DRA. The arbitrator granted the motion, and issued an award dismissing the claim. Pearson then filed a petition to confirm the arbitration award.

Turcios opposed Pearson's motion to confirm, and filed his own motion to vacate the award. The trial court denied Pearson's petition to confirm and granted Turcios' motion to vacate the award.

The trial court's order was based on several points, some of which are limited to the facts of the case, and only one of which is of general importance. On the one significant legal issue, the trial court cited the preeminent California Supreme Court decision in this area, *Armendariz v. Foundation Health Psychcare Servs., Inc.*,⁴ as holding that FEHA claims are unwaivable statutory rights that must be protected.⁵ Because FEHA rights are unwaivable, including the statute of limitations, any contrary arbitration agreement is invalid. Thus, according to the trial court, by enforcing the DRA's one-year statute of limitations, the arbitrator had exceeded his authority in that he denied Turcios' unwaivable right to a longer statute of limitations.

The court of appeal reversed. While acknowledging the primacy of *Armendariz*, the court looked at the particular facts of this case and held that the arbitrator had not denied unwaivable rights to Turcios. The court noted that, unlike other reviewing courts, it was examining the case *after* an arbitration had taken place, rather than before a matter had been sent to arbitration. With this valuable hindsight, the court found that under the facts of the case, the arbitrator's enforcement of the DRA's statute of limitations did not deprive Turcios of any fundamental rights. The court noted that Turcios filed his lawsuit within less than one year after the termination. Thus, even though Turcios had signed an arbitration agreement, he chose to pursue a court action rather than arbitration. Given that Turcios filed his court action within one year of his termination, the same amount of time granted by the DRA, it

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Employment Law Case Notes

By Anthony J. Oncidi



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Unionized Employees Were Required to Arbitrate Age Discrimination Claims

14 Penn Plaza LLC v. Pyett, 556 U.S. ___, 129 S. Ct. 1456 (2009)

Plaintiffs, members of the Service Employees International Union (SEIU), filed a complaint with the Equal Employment Opportunity Commission, alleging age discrimination under the Age Discrimination in Employment Act and, after receiving their right-to-sue letters, filed suit against their employer alleging age discrimination. In response, the employer filed a motion to compel arbitration of the claims pursuant to the Federal Arbitration Act on the ground that the collective bargaining agreement negotiated by SEIU required union members to submit all claims of employment discrimination to binding arbitration. The district court denied the employer's motion to compel arbitration on the ground that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." The Court of Appeals for the Second Circuit affirmed the ruling, but the United States Supreme Court reversed, holding that such a provision is enforceable as a matter of federal law.

Editor's Note: This case is analyzed in depth in this issue's MCLE Self-Study article, "The Pyett Decision: A Major Shift in Doctrine, but Limited Impact."

"Me Too" Evidence Was Admissible In Pregnancy Discrimination Lawsuit

Johnson v. United Cerebral Palsy/Spastic Children's Found., 173 Cal. App. 4th 740 (2009)

Dewandra Johnson, who was employed as a counselor for the defendant charitable foundation, alleged that she had been terminated while and because she was pregnant. Johnson also alleged that her supervisor, Raquel Jiminez, had a

discriminatory animus against pregnant and heterosexual women and that Jiminez gave preferential treatment to gay and lesbian employees and specifically recruited gays and lesbians to fill positions within the foundation. In its summary judgment motion, the foundation asserted that it had conducted a good faith investigation into Johnson's time sheets and billing records, and concluded that Johnson had falsified such records and that that was the basis for the termination of her employment. The trial court granted the foundation's motion for summary judgment, but the court of appeal reversed, holding that Johnson had produced substantial evidence that the stated reason for her firing was pretextual and/or that the employer had acted with discriminatory animus in firing her. Further, the appellate court held that the declarations Johnson had submitted from other employees recounting alleged pregnancy discrimination at the hands of defendants required reversal of the summary judgment.

Plumbing Company Was Not Liable for Former Employee's Murder of Customer

Phillips v. TLC Plumbing, Inc., 172 Cal. App. 4th 1133 (2009)

Trisha Phillips, the daughter and successor in interest of decedent Judith Phillips, filed a complaint against TLC, alleging negligent hiring and retention of James Joseph Cain after Cain, a former employee of TLC, murdered Judith. While Cain was employed as a plumbing service repairman for TLC, he was dispatched on a service call to Judith's residence on two separate occasions. Shortly thereafter, Cain and Judith began a social relationship that evolved into a romantic one. Approximately a month later, TLC terminated Cain (who was on parole after having been convicted of domestic violence and/or an arson offense involving his wife) for misuse of a

company vehicle, for drug and alcohol use and for apparently threatening a coworker. Some two years after his termination from TLC, Judith ended the relationship and applied for a restraining order against Cain, who subsequently shot and killed her. The trial court granted TLC's motion for summary judgment on the ground that there was no employment relationship between TLC and Cain at the time he shot and killed Judith and because "it was not reasonably foreseeable that Cain would enter into a personal relationship with Judith which would later lead to Cain's shooting and killing her years after he provided plumbing services to her." The court of appeal affirmed. *Cf. Burns v. Neiman Marcus Group, Inc.*, 173 Cal. App. 4th 479 (2009) (plaintiff, whose secretary spent in excess of \$1 million at Neiman Marcus with unauthorized checks drawn on plaintiff's personal bank account, could not proceed with negligence claim against Neiman Marcus).

Complaint Alleging Violation of UTSA and Unfair Competition Was Not Subject to Dismissal Under Anti-SLAPP Law

World Fin. Group, Inc. v. HBW Ins. & Fin. Servs., Inc., 172 Cal. App. 4th 1561 (2009)

WFG filed a complaint against its direct competitor, HBW, and six of its agents for alleged breach of contract, misappropriation of trade secrets, conversion, unfair competition, interference with prospective economic advantage, and unjust enrichment. In response, HBW filed a motion to dismiss the complaint as a SLAPP (strategic lawsuit against public participation) suit pursuant to Code of Civil Procedure section 425.16. In its anti-SLAPP motion, HBW asserted that all of WFG's claims were based on defendants' speech and conduct in furtherance of the exercise of their right to free speech in connection

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Wage and Hour Update

By Donna Ryu,
Sarah Beard, and
Matthew Goldberg

Labor Code Section 351 and Tip Pooling Cases Update

Budrow v. Dave & Buster's of Cal., Inc., 171 Cal. App. 4th 875 (2009)

Grodensky v. Artichoke Joe's Casino, 171 Cal. App. 4th 1399 (2009)

Etheridge v. Reins Int'l Cal., Inc., 172 Cal. App. 4th 908 (2009)

Chau v. Starbucks Corp., San Diego Super. Ct. Case No. GIC836925

In *Budrow v. Dave & Buster's of Cal., Inc.*, 171 Cal. App. 4th 875 (2009), plaintiff, a cocktail server, brought a putative class action against defendant, alleging that distributions from defendant's mandatory tip pool to restaurant employees who did not provide direct table service to patrons, including bartenders, violated Labor Code section 351, which prohibits employers and their agents from sharing in an employee's gratuities.

On appeal of a grant of summary judgment for defendant, the Second District Court of Appeal affirmed, holding that bartenders may participate in tip pools established pursuant to Labor Code section 351. Examining section 351, the court found the clear and unambiguous language of the provision did not impose a "direct table service" requirement on tip pools. Further, the court rejected plaintiff's suggestion that *Leighton v. Old Heidelberg*, 219 Cal. App. 3d 1062 (1990), the first California opinion regarding the legality of mandatory tip pools, created a direct table service requirement on tip pools. The court found that *Old Heidelberg*, which held that tip pools in which servers, bartenders and bussers participate are legal, did not define "direct" versus "indirect" service; nor did it address which employees are to be excluded from a tip pool. Further, the court in *Old Heidelberg* made no attempt to fashion a rule that would limit tip pools to certain employees, and did not

decide what limitations, if any, to place on the types of employees who can be included in a tip pool. As it concluded that the tip pool in question was not illegal, the court declined to decide the merits of defendant's contention that section 351 does not create a private right of action.

In *Grodensky v. Artichoke Joe's Casino*, 171 Cal. App. 4th 1399 (2009), the First District Court of Appeal weighed in on the subject of Labor Code section 351 and tip pools. Plaintiff, a card dealer, filed a class action suit challenging defendant's mandatory tip pooling policy for dealers, alleging violations of Labor Code section 351, Business and Professions Code section 17200 et seq. (the Unfair Competition Law or UCL), and other wage and hour violations. After granting class certification and conducting a bench trial, the trial court found that the mandatory tip pool in place was legal, but determined that shift managers were agents of the casino and therefore the casino violated section 351 by permitting them to share in the tip pool. Both parties appealed.

In relevant part, the court of appeal, citing *Old Heidelberg* and *Budrow*, upheld the trial court's determination that the mandatory tip pool for card dealers did not violate section 351. In addition, the first district split with the second district's recent holding in *Lu v. Hawaiian Gardens*, 170 Cal. App. 4th 466 (2009), review granted (Apr. 29, 2009), S171442/B194209., that section 351 does not provide a private right of action. On this issue, the *Grodensky* court upheld the trial court's determination that Labor Code section 351 does provide a private right of action for employees to recover tips unlawfully collected by an employer, and that restitution under the UCL was a proper remedy. Considering the language, context, and legislative history of section 351, the court found that in

expressly stating in the statute that every gratuity is "the sole property of the employee or employees to whom it was paid, given, or left for," the legislature appeared to be strongly implying that employees have a private right of action. Otherwise, the statute provides employees with an unenforceable right, as the Department of Industrial Relations has no authority to recover gratuities wrongfully taken by an employer. The court found that the legislature did not need to specify a private right of action in section 351 because the *only* method for recovering a tip is a civil action. The court disagreed with the *Lu* court's conclusion that the enactment of the Private Attorney General Act (PAGA)¹ as an enforcement vehicle implied a legislative recognition that a private cause of action under section 351 is not viable, as PAGA empowers employees to sue for civil penalties, rather than to recover the tip money wrongfully taken. The California Supreme Court will decide this question when it reviews the *Lu* case.

In *Etheridge v. Reins Int'l Cal., Inc.*, 172 Cal. App. 4th 908 (2009), the Second District Court of Appeal extended the holding in *Budrow*, finding that restaurant employees who participate in the "chain of service," even if they do not provide *direct* table service, may participate in mandatory tip pools. Plaintiff, a restaurant server who was required by his employer to participate in a tip pool, brought a class action challenging the defendant's policy under which servers were required to share tips with restaurant employees who did not provide direct table service, such as kitchen staff, bartenders, and dishwashers. Plaintiff argued that the policy violated Labor Code section 351. The trial court sustained defendant's demurrer without leave to amend and plaintiff appealed.

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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.

TEACHERS

Senior Teachers May Not Necessarily Bump Junior Teachers in Reduction-in-Force Proceedings

Bledsoe v. Biggs Unified Sch. Dist., 170 Cal. App. 4th 127 (2008)

In reduction-in-force cases conducted pursuant to Education Code section 44955, layoffs normally proceed according to the order of seniority. That is, a senior teacher whose job is being reduced or eliminated has the right to “bump” a junior teacher, so long as the senior teacher is “certificated and competent” to render the service provided by that junior teacher. On the other hand, a school district is entitled to “skip” a junior teacher who is being retained for specified reasons which do not match the qualifications of the senior teacher who is therefore denied bumping rights. This case involved the layoff of a senior tenured teacher teaching English and Social Science at the seventh and eighth grade levels. At the same time, the district did not lay off two junior teachers who were teaching at a “community day school” that served students who had been expelled from other schools or who had behavior problems that prevented them from being in a regular classroom. The testimony elicited in the administrative proceeding was to the effect that the two junior teachers in the day school were effective in providing those services. The senior teacher contended that he had had course work in psychology and sociology in college, and had worked in a community day school eleven years earlier. The administrative law judge issued a proposed decision upholding the layoff of the senior teacher based upon his finding that the senior teacher lacked the special training and experience necessary to teach at a community day school. The governing board of the district adopted the proposed decision and sent a layoff notice to the senior teacher.

A petition for writ of mandate was filed on behalf of the senior teacher. The trial court denied the petition, and the court of appeal affirmed the judgment of the trial court. The court of appeal concluded that the senior teacher was certificated and competent to teach community day school. However, it disagreed with the petitioner’s assertion that the district failed to present evidence showing a need for specific teachers to teach in its community day school. It cited testimony that the day school served a distinct and difficult student population and that teachers needed a specialized background in order to deal with students with extreme behavioral difficulties. In the opinion of the court, the evidence supported the finding that the junior teachers had the special training and experience necessary to teach at the community day school notwithstanding the fact that the senior teacher was credentialed and competent.

There is an additional holding by the court of appeal. Under the law, teachers subject to layoff who have the same first date of service in a probationary position are to have such a “tie” resolved by the application of standards adopted by the governing board for the resolution of such ties. In this case, the district had not, prior to the hearing, resolved a tie between the senior teacher and another teacher whose first date of paid service was the same. The court held that this was not a prejudicial error, because the witness for the district was able to testify on the stand how the tiebreaking criteria would apply between the two candidates for layoff.

Seniority Does Not Necessarily Protect Part-Time Certificated Employees in Reduction-in-Force Proceedings

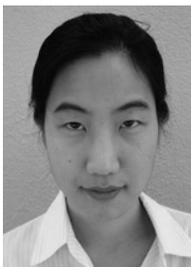
Hildebrandt v. St. Helena Unified Sch. Dist., 172 Cal. App. 4th 334 (2009)

As noted in the discussion of *Bledsoe*, above, Education Code section 44955 provides that permanent certificated

employees may not be terminated if there are junior employees who are retained to provide services which the senior is certificated and competent to render. In this case, the certificated employees were senior school psychologists, one of whom was tenured at .8 of a full-time equivalent position and the other at .2 of a full-time equivalent position. They were both senior to a third psychologist who was employed full-time. Although all three received termination notices, the school district rescinded the notice of the junior employee but not the two senior employees. The administrative law judge found that the district was entitled to eliminate one full-time equivalent psychologist position but rejected the argument by the two part-time psychologists that their seniority mandated that they be retained in preference to the junior employee. Although the court of appeal conceded that there was “considerable force” to the contention of the senior psychologists that there was no evidence that they were not competent to perform the services, it nonetheless affirmed the trial court’s judgment denying their petition for writ of mandate. “The heart of the dispute lies within the alternate ground on which the decision in [*Murray v. Sonoma County Office of Educ.*, 208 Cal. App. 3d 456 (1989)] is based. The provisions in both section 44955 and 44956 . . . prohibit a school district, under the circumstances to which the sections apply, from employing a person with less seniority to ‘render a service’ that an employee with greater seniority is qualified to perform. *Murray* held that a part-time position to perform a particular assignment is not the same ‘service’ as a full-time position to perform the same assignment.” The senior psychologists argued that *Murray* misinterpreted the word ‘service’ and asserted that the teacher’s ‘service’ has no

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NLRA Case Notes

By Jean Shin*

The Employer Unlawfully Interrogated Employees and Created an Impression That Their Union Activities Were Under Surveillance by Withholding the Source of Its Intelligence

Stevens Creek Chrysler Jeep Dodge, Inc., 353 NLRB No. 132 (Apr. 20, 2009)

The National Labor Relations Board (the Board) held that the employer, an auto dealership, violated the National Labor Relations Act (the Act)¹ by interfering with, coercing, or intimidating employees during an organizing campaign. The Board also found additional violations of the Act.

The Board found that the employer unlawfully interrogated employees in violation of the Act when a service manager individually summoned several employees into his office and asked them whether they had attended a lunchtime union meeting and signed authorization cards. In addition, the Board found two more occasions on which employees were unlawfully interrogated. On one occasion, a service manager telephoned an employee, Michael Lane, and asked him who was behind the organizing drive. On another occasion, the owner of the auto dealership asked employees to tell him who had paid for the pizza at a union organizing meeting.

The Board found that both these instances of questioning were coercive and thus violated the Act. Applying the factors set out in *Bloomfield Health Care Center*, 352 NLRB 252 (2008), the Board looked at whether the interrogated employee was openly a union supporter; the background of the interrogation; the nature of the information sought; the identity of the questioner; and the place and method of the interrogation. The Board found that neither Lane nor the employees who were interrogated about the pizzas were open supporters of the union. In addition, the questioning took place against the background of the

employer's general hostility towards union activity. Furthermore, the company's owner and a high-ranking official conducted the questioning. Finally, the nature of the information sought—the identity of the union organizers and supporters—strongly supported a finding that the questioning was coercive. There was no showing of valid purpose.

The Board also found that the employer had unlawfully created an impression among employees that their union activities were under surveillance. The service manager had called individual employees into his office and told them that the employer was aware that there had been a union meeting, and that authorization cards had been signed. He did not, however, identify his source, leaving employees speculating about how the employer obtained the information. They reasonably concluded that the information was obtained through employer monitoring. The Board found that this created an impression of surveillance that constituted a separate violation of section 8(a)(1) of the Act.

In Cases Turning Upon the Employer's Motivation, a Judge May Not Independently Supply Reasons for the Employer's Actions

Spurlino Materials, LLC, 353 NLRB No. 125 (Mar. 31, 2009)

The union alleged that the employer, which manufactures and delivers ready-mix concrete to the construction industry, acted illegally with respect to work performed at new job sites.

The Board held that the employer acted unlawfully by unilaterally creating two new positions at a new job site, called the Stadium project, and by unilaterally instituting a new evaluation system for the purpose of selecting unit employees to fill these positions. The employer argued that the two new positions were not new job classifications, but rather

simply a transfer of existing work to the Stadium project site. The Board was not persuaded. It held that the question of whether the new positions were new job classifications or merely transfers to another facility was not dispositive. Either way, the employer had an obligation to bargain with the union before departing from established practices to staff the positions.

The Board also affirmed the administrative law judge's finding that the employer violated sections 8(a)(1) and (3) of the Act when it failed to select three prominent union supporters to fill the newly-created positions, and when it suspended and later discharged one of them. Each of the three employees had recently served as members of the union's pre-election organizing committee, as election observers, and as employee representatives on the union's bargaining committee. The Board found that the employer's treatment of the employees constituted unlawful discrimination.

The Board also held that the employer acted unlawfully when it failed to dispatch the three prominent union supporters to the Stadium project according to the established seniority system. When the employer made deliveries to the Stadium project, it did not dispatch employees in the usual order. As a result, the three employees at issue made fewer runs to the Stadium project than they should have, according to their seniority. This was significant because employees dispatched to the Stadium project were paid significantly more than employees on other assignments.

The employer denied having deviated from the normal dispatch procedure. Under *Wright Line*, 251 NLRB 1083 (1980), once the initial burden is met of demonstrating that protected activity was a motivating factor in an adverse action, the burden lies with the

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Cases Pending Before the California Supreme Court

By Phyllis W. Cheng



Phyllis W. Cheng is Director of the California Department of Fair Employment and Housing. She prepares the Labor & Employment Case Alert, a free "electronic alert service" on new cases for Section members. To subscribe online at <http://www.calbar.ca.gov>, log onto "My State Bar Profile" and follow the instructions under "Change My E-mail Addresses and List Subscriptions."

ARBITRATION

Pearson Dental Supplies, Inc. v. Superior Ct. (Turcios), 166 Cal. App. 4th 71 (2008), review granted, 85 Cal. Rptr. 3d 693 (2008). S167169/B206740. Petition for review after grant of petition for peremptory writ of mandate. (1) What standard of judicial review applies to an arbitrator's decision on an employee's anti-discrimination claim under the Fair Employment and Housing Act (Cal. Gov't Code § 12900 et seq.) that is arbitrated pursuant to a mandatory employment arbitration agreement? (2) Can such a mandatory arbitration agreement restrict an employee from seeking administrative remedies for violations of the Act? Answer brief due.

ATTORNEYS' FEES

Vasquez v. State of Cal., 154 Cal. App. 4th 406 (2007), review granted, 65 Cal. Rptr. 3d 73 (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. Board of Supervisors*, 169 Cal. App. 3d 960, 966-67 (1985).) Holding for lead case.

Chavez v. City of Los Angeles, 160 Cal. App. 4th 410 (2008), review granted, 72 Cal. Rptr. 3d 783 (2008). S162313/B192375. Petition for review after reversal of order denying attorneys' fees. Whether on a modest recovery by the prevailing party under the Fair Employment and Housing Act, the court may exercise its discretion under Cal. Code Civ. Proc.

§ 1033(a) to deny fees as costs under § 1033.5(a)(10)(B). Fully briefed.

CLASS ACTION

Arias v. Superior Ct., 153 Cal. App. 4th 777 (2007), review granted, 63 Cal. Rptr. 3d 272 (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? Submitted/opinion due.

COMPENSATION

Schachter v. Citigroup, Inc., 159 Cal. App. 4th 10 (2008), review granted, 70 Cal. Rptr. 3d 776 (2008). S161385/B193713. Petition for review after reversal and remand of summary judgment. Whether the forfeiture provisions of a voluntary incentive compensation plan violate Labor Code sections 201 and 202, which require an employer to pay its employee all earned but unpaid compensation following the employee's discharge or his or her voluntary termination of employment. Fully briefed.

DISCRIMINATION/STRAY REMARKS

Reid v. Google, 155 Cal. App. 4th 1342 (2007), review granted, 72 Cal. Rptr. 3d 112 (2008). S158965/H029602. Petition for review after affirmance in part and reversal in part of judgment. (1) Should California law recognize the "stray remarks" doctrine, which permits the trial court in ruling on a motion for summary judgment to disregard isolated discriminatory remarks or comments unrelated to the decision-making process as insufficient to establish discrimination? (2) Are evidentiary objections not expressly ruled on at the time of

decision on a summary judgment motion preserved for appeal? Fully briefed.

GOVERNMENT EMPLOYMENT

City of San Jose v. Operating Eng'rs Local Union No. 3, 160 Cal. App. 4th 951 (2008), review granted, 73 Cal. Rptr. 3d 159 (2008). S162647/H030272. Petition for review after affirmance of judgment of dismissal. Does the Public Employment Relations Board have the exclusive initial jurisdiction to determine whether certain "essential" public employees covered by Meyers-Milias-Brown Act (Cal. Gov't Code §§ 3500—3511) have the right to strike, or does that jurisdiction rest with the superior court? Fully briefed.

County of Contra Costa v. Public Employees Union, 163 Cal. App. 4th 139, (2008), review granted, 81 Cal. Rptr. 3d 614 (2008). S164640/A115095 (lead), A115118. Petition for review after affirmance of temporary restraining orders in two civil actions. Briefing deferred pending decision in *City of San Jose v. Operating Engineers Local Union No. 3*, S162647, *supra*. Review granted/briefing deferred. Holding for lead case.

County of Sacramento v. AFSCME Local 146, 165 Cal. App. 4th 401 (2008), review granted 85 Cal. Rptr. 3d 687 (2008). S166591/C054060 (lead), C054233. Petition for review after the court of appeal reversal and remand on grant of injunction enjoining unions from ordering or encouraging certain public employees to participate in a strike. Briefing deferred pending decision in *City of San Jose v. Operating Engineers Local Union No. 3*, S162647, *supra*. Holding for lead case.

HARASSMENT AND DAMAGES

Roby v. McKesson HBOC, 146 Cal. App. 4th 63 (2006), review granted, 53 Cal. Rptr. 3d 558 (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? Fully briefed.

KIN CARE

McCarther v. Pacific Telesis Group, 163 Cal. App. 4th 176 (2008), *review granted*, 82 Cal. Rptr. 3d 169 (2008). S164692/A115223. Petition for review after reversal of judgment. (1) Does Cal. Lab. Code § 233, which mandates that employees be allowed to use a portion of "accrued and available sick leave" to care for sick family members, apply to employer plans in which employees do not periodically accrue a certain number of paid sick days, but are paid for qualifying absences due to illness? (2) Does Cal. Lab. Code § 234, which prohibits employers from disciplining employees for using sick leave to care for sick family members, prohibit an employer from disciplining an employee who takes such "kin care" leave if the employer would have the right to discipline the employee for taking time off for the employee's own illness or injury? Fully briefed.

PENSION BENEFITS

Lexin v. Superior Ct. (People), 154 Cal. App. 4th 1425 (2007), *review granted*, 65 Cal. Rptr. 3d 574 (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? Fully briefed.

POLICE OFFICERS

Galindo v. Superior Ct. (City of Los Angeles Police Dep't), 169 Cal. App. 4th 1332 (2009), *review granted*, 91 Cal. Rptr. 3d 516 (2009). S170550/B208923. Petition for review after denial of peremptory writ of mandate. Does a criminal defendant have a right to obtain *Pitchess* discovery (*Pitchess v. Superior Ct.* 11 Cal. 3d 531 (1974)) prior to the preliminary hearing? Answer brief due.

PRIVACY

Hernandez v. Hillside, 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? Oral argument was scheduled for Wednesday, June 3, 2009, 9:00 a.m., Los Angeles.

PROPOSITION 209

Coral Constr., Inc. v. City & County of San Francisco, 149 Cal. App. 4th 1218 (2007), *review granted*, 57 Cal. Rptr. 3d 781 (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 article I, 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? Fully briefed.

REPRESENTATIVE CLAIMS

Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct. (First Transit, Inc.), 148 Cal. App. 4th 39 (2006), *review granted*, 61 Cal. Rptr. 3d 459 (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? Submitted/opinion due.

San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified Sch. Dist., 154 Cal. App. 4th 866 (2007), *review granted*, 68 Cal. Rptr. 3d 528 (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? Submitted/opinion due.

WAGE AND HOUR

Brinker Rest. v. Superior Ct. (Hohnbaum), 80 Cal. Rptr. 3d 781 (2008), *review granted*, 85 Cal. Rptr. 3d 688 (2008). S166350/D049331. Petition for review after grant of petition for peremptory writ of mandate. This case presents issues

concerning the proper interpretation of California's statutes and regulations governing an employer's duty to provide meal and rest breaks to hourly workers. Answer brief due.

Brinkley v. Public Storage, Inc., 167 Cal. App. 4th 1278 (2008), review granted, 87 Cal. Rptr. 3d 674 (2009). S168806/B200513. Petition for review after affirmance of judgment. Briefing deferred pending decision in *Brinker Restaurant Corp. v. Superior Court*, S166350, supra. Holding for lead case.

Harris v. Superior Ct. (Liberty Mut. Ins.), 154 Cal. App. 4th 164 (2007), review granted, 68 Cal. Rptr. 3d 528 (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? Fully briefed.

Lu v. Hawaiian Gardens Casino Inc. (2009) 170 Cal. App. 4th 466, review granted, 2009 Cal. LEXIS 4266 (2009), S171442/B194209. Petition for review after the court of appeal affirmed in part and reversed in part the motions for judgment on the pleadings and summary adjudication. This case presents the following limited issue: Does Cal. Lab. Code § 351, which prohibits employers from taking "any gratuity or part thereof that is paid, given to, or left for an employee by a patron," create a private right of action for employees? Review granted/brief due.

Martinez v. Combs, decision without published opinion, 2004 Cal. LEXIS 1914, 2003 WL 22708950 (2003), review granted, 2004 Cal. Daily Op. Service 1941; 2004 Daily Journal DAR 2859 (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.

Pineda v. Bank of Am., N.A., 170 Cal. App. 4th 388 (2009), review granted (Apr. 22, 2009), S170758/A122022. Petition for review after the court of appeal affirmed grant of a motion for judgment on the pleadings. (1) When a worker files an action to recover penalties for late payment of final wages under Cal. Lab. Code § 203, but does not concurrently seek to recover any other unpaid wages, which statute of limitations applies: the one-year statute for penalties under Cal. Code Civ. Proc. § 340(a), or the three-year statute for unpaid wages under Cal. Lab. Code § 202? (2) Can penalties under Cal. Lab. Code § 203 be recovered as restitution in an Unfair Competition Law action (Cal. Bus. & Prof. Code § 17203)? Review granted/brief due.

WHISTLEBLOWER PROTECTION ACT

Ramirez v. Department of Health Servs., decision without published opinion, 2007 Cal. App. Unpub. LEXIS 9876, 2007 WL 779451, review granted. S152195/C050718. Petition for review after affirmance of judgment. Briefing deferred pending decision in *State Bd. of Chiropractic Exam'rs v. Superior Ct.*, 45

Cal. 4th 963 (2009), which held that administrative exhaustion of a whistleblower retaliation claim did not require a challenge of State Personnel Board findings. Holding for lead case.

Brand v. Regents of Univ. of Cal., 159 Cal. App. 4th 1349 (2008), review granted, 76 Cal. Rptr. 3d 681 (2008). S162019/D049350. Petition for review after affirmance in part and reversal in part following sustaining of demurrer. Briefing deferred pending decision in *State Bd. of Chiropractic Exam'rs v. Superior Ct.*, supra. Holding for lead case.

Runyon v. California State Univ., decision without published opinion, 2009 Cal. LEXIS 1263, 2008 WL 4741061 (2008), review granted (Jan. 29, 2009). S168950/B195213. Petition for review after affirmance of summary judgment. (1) Must an employee of the California State University exhaust administrative and judicial remedies with respect to a challenged administrative decision in order to bring a claim under the California Whistleblower Protection Act (Cal. Gov't Code § 8547 et seq.)? (2) What standard governs the determination whether the employee's internal complaint has been "satisfactorily addressed" (Cal. Gov't Code § 8547.12(c)) by the California State University? Answer brief due. ⁴²

"In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute."

~ Thurgood Marshall



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- Retaliation Under the FEHA and Federal Law, Including What Is Protected Activity and Federal vs. State Court?
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- The Evolution of FEHA Litigation
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- The Year in Review: Recent Developments in Statutory and Case Law
- Wage and Hour Law in Review
- The Status of Collective Bargaining and the Labor Movement Today, Including the EFCFA
- Sexual Harassment Investigations: Conducting Them, Attacking Them, and Pitfalls with Witnesses
- EPLI
- Public Sector Update
- Employment Mediation in the 10's: What Hath Time Wrought?
- Class Action Strategies
- Trial Demonstrations: Direct and Cross of Expert Witnesses
- Ethical Considerations in Labor and Employment Law
- Religion: God in the Workplace
- Comparative Models for Addressing Workplace Discrimination
- Has Labor Law's Time for Revolution Come?
- Race, Color, National Origin and Ancestry: Is it a Postracial Society? How and Why Should the Legal Profession Address Diversity in its Ranks?
- UCLA Rand Corporation Research Presentation

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*California Layoff Basics—
Two Perspectives (Employees)
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difficult decisions about layoffs. Even objective decisions, if they adversely affect a greater number of protected employees than non-protected employees, can violate the FEHA.

The Equal Employment Opportunity Commission (EEOC) has reported a 15 percent increase in employment discrimination complaints filed nationwide in 2008. California's statistics are consistent with the national rate: in calendar year 2008, DFEH employment discrimination complaint filings increased 14.57 percent, to 18,785—a figure that is expected to rise in 2009 given the current economic climate. While every employer must comply with the FEHA when implementing layoffs, not every protected employee who is laid off will have a viable claim under the FEHA. Nonetheless, it is important for attorneys advising employees to keep the following in mind to ensure their rights are protected:

ASK THE EMPLOYER TO IDENTIFY THE REASON FOR THE LAYOFF OR TERMINATION

The FEHA does not prohibit all layoffs or terminations—only discriminatory ones. Employers should communicate with affected employees whether a layoff is company- or unit-wide, and the reason for implementing the layoff, such as reduced revenues, reduced work orders, or other reasons. If a layoff is not company-wide, affected employees should inquire about the employer's reason for selecting a particular unit or location for layoff, as opposed to others. This inquiry is particularly important when a layoff affects only a single employee. If the layoff is performance-based, the employee should be sure to inquire about the particular performance issues that led to the employer's decision and ask to see documentation. The more information an employee is able to obtain about the reason for his or her layoff or termination, the less likely the reason given is a pretext for discrimination.

ASK FOR SELECTION CRITERIA

Many employees file employment discrimination complaints with the DFEH because they believe their layoff or termination was undeserved or “unfair.” Under the FEHA, a business practice is unlawful and unfair only if it is based on, or adversely affects employees who possess, a protected characteristic listed in the FEHA. To prove a violation of the FEHA, an employee must establish that he or she was selected for layoff because, for example, he or she has a disability or is of a certain age, sexual orientation, or race. Alternatively, the employee may prove that a company's neutral criteria (such as seniority or location) resulted in the layoff of a greater number of employees who have a disability or are of a certain age, sexual orientation, race, or other protected characteristic.

NOTICE SIMILARITIES AND DIFFERENCES

How does an employee affected by a company's reduction in work force compare to other employees who have been laid off? Does he or she share the same sexual orientation, race, religion, or ethnic background, for example? Is he or she of

*California Layoff Basics—
Two Perspectives (Employers)
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implemented, it is more important than ever to understand the FEHA and to appreciate that it provides broader protection than Title VII.

The FEHA prohibits employers from making decisions based on a protected trait such as race, national origin, sex, age, religion, disability, sexual orientation, or certain other characteristics. By basing a layoff decision on objective business or economic reasons, an employer decreases the risks of a FEHA violation; but that alone does not eliminate the risks. Layoffs based on legitimate, nondiscriminatory reasons can still lead to liability under the FEHA if, among other things, they disproportionately impact a protected class. To minimize the risk of FEHA-based claims and litigation, employers should consider the following basic factors when making layoff decisions:

CLEAR SELECTION CRITERIA

Companies typically combine performance-based and non-performance-based criteria when deciding which employees to lay off. In our experience, few employers actually *intend* to rely on an unlawful criterion. In the mass-number of layoffs happening today, however, it is an unfortunate reality that employees with good performance records are being laid off, so the challenge is to ensure that the overall criteria are lawful. One of the best and simplest tests that every employee should use is to ask the decisionmakers to *articulate*, clearly and persuasively, the exact reasons why he or she was chosen. If the response is wishy-washy, you can bet that the employee has little to lose in challenging that decision by going to the DFEH. It is generally easy for decisionmakers to identify objective factors; the challenge is to identify and articulate the subjective ones.

ANALYZE THE STATISTICS

After the initial decisions have been made, employers should gather information pertaining to the race, national origin, sex, age, and other characteristics of those affected by the layoff. The point of this is to determine whether any protected class appears to have been targeted or disproportionately impacted. Under the federal Age Discrimination in Employment Act,⁵ it is mandatory under certain circumstances to provide the affected employees with information detailing the ages of everyone in their unit or department who was or was not laid off, which is an easy way to see if those over 40 years old were disproportionately impacted by the layoffs. If any protected group is affected disproportionately, this could lead to a “disparate impact” claim. The company should therefore re-evaluate its criteria to avoid singling out, or appearing to single out, a protected group. The concept of “disparate impact” can be complicated, and this is an area where employers should work with counsel to analyze this data.

TRAIN MANAGERS

The company's managers should be thoroughly trained on the selection criteria and directed to follow the layoff plan. If

approximately the same age (40 years old and above)? If not, then it is unlikely the company's layoff plan has violated the FEHA. If the employee and his or her laid-off colleagues share the same protected characteristic, it is advisable to communicate those observations to a manager or the human resources department, and ask that the matter be addressed. The employee should then follow up to determine whether, and how, the employer has addressed those concerns. A failure to address such concerns may provide valuable evidence.

THE EMPLOYEE SHOULD MAKE NOTES AND SAVE DOCUMENTS

An employee who believes his or her layoff or termination was discriminatory has one year from the effective date of separation to file a complaint with the DFEH. If a DFEH complaint is accepted for investigation, the employee will be asked to identify witnesses and provide any documents that support the claim. It is important to save any documents from the employer and any notes made of conversations or observations about other employees who were laid off, as well as any home addresses and telephone numbers for co-workers and managers. This information will assist in the investigation of the employee's claims.

SEVERANCE AGREEMENTS

Any legal document should be carefully read before signing; this is particularly so with a severance agreement. Receipt of a severance package is typically conditioned upon execution of a release and waiver agreement that will bar an employee from later bringing claims against the employer for harms that occurred during employment. If properly drafted, such agreements apply to claims unknown to the employee at the time he or she signs the agreement, including discrimination claims. An employee who discovers a layoff was discriminatory after he or she signs a severance agreement may be barred from later taking action against the employer. Thus, all time given to review the document should be utilized and, if at all possible, the severance agreement should be reviewed by counsel *before* it is signed. Importantly, a valid release and waiver agreement does not bar the DFEH from investigating a complaint and obtaining nonmonetary relief, such as requiring an employer to undergo training or to implement nondiscrimination policies.

EMPLOYEES SHOULD KNOW THEIR RIGHTS

The DFEH can accept complaints based only on possible violations of the FEHA, Unruh Civil Rights Act, or Ralph Civil Rights Act.⁴ A complaint will be rejected when the allegations, if proven, would not constitute a violation of the laws the DFEH enforces.

Detailed information about the Department's complaint procedure and the laws the DFEH enforces is available on the Department's Web site at www.dfeh.ca.gov. Employees who believe they have experienced a discriminatory layoff or other unlawful employment practice may contact the Department at (800) 884-1684 to schedule an intake appointment. Intake appointments may also be made online at www.dfeh.ca.gov/onlineAppt/. Employees represented by counsel who wish to request an immediate right-to-sue letter may do so at

managers are responsible for selecting workers to be laid off, they should be reminded not to consider or discuss race, national origin, sex, age, religion, disability, sexual orientation, pregnancy, childbirth, or any other protected characteristic during the decision-making process. Furthermore, a team of managers—and not just the single manager in the chain-of-command—should be used to make layoff selections, so as to promote objectivity and consistency.

ADHERE TO THE FINAL POLICY

Employers should stick to the selection criteria. Creating exceptions and undermining the policy can open the door to personal preferences and biases, which can subject the employer to discrimination and other employment-related lawsuits.

CLEARLY EXPLAIN THE DECISION-MAKING PROCESS TO THE EMPLOYEE

It is important that employers be forthright when explaining to the affected employee the reasons why he or she was selected for layoff. Employers should clearly and thoroughly explain the decision-making process and the reasons behind it. If performance reasons were part of the selection criteria, employers should not hesitate to explain this. The more a laid-off employee understands the process and reasoning behind the decision, the less likely it is that he or she will challenge the decision and bring a claim under the FEHA.

DOCUMENT THE REASON FOR THE LAYOFF

In the event a claim for discrimination is filed under the FEHA, the employer's defense may largely depend on its ability to prove the legitimate business reasons that necessitated the layoff and the specific criteria behind the selection process. This can be difficult to do months, and possibly years, after the decision was made. Therefore, employers should document the company's financial situation and circumstances that trigger the overall decision to conduct layoffs. The decision might be a result of cash flow problems, for example, so a "snapshot" of that situation will go far in proving the economic landscape facing the company at the time of layoffs. Documentation supporting every individual layoff choice should also be made—keeping in mind that it may be just as important to document why someone else was *not* selected. The ability to discuss comparable employees is key to defending FEHA claims. The goal is to be able to duplicate the decision-making process and outcome.

REVIEW THE CONTRACTUAL AND UNEMPLOYMENT BENEFITS OBLIGATIONS

Before any employee is laid off, employers should confirm that none of the employees in the target group have employment agreements obligating the employer to a certain term of service or severance payment. The company should also review its employee handbook and/or human resources policies to determine if it has promised its employees severance benefits and whether it will have to reimburse the government for unemployment benefits.

California Layoff Basics—
Two Perspectives (Employees)
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www.dfeh.ca.gov/onlinerts/. If an employee chooses to request an immediate right-to-sue letter, the DFEH will not investigate the complaint. ⁴

ENDNOTES

1. The statements and opinions in this article are those of Ms. Billotti and not those of the Department of Fair Employment and Housing.
2. Gov't Code § 12900 et seq.
3. 42 U.S.C. § 2000e et seq.
4. The Unruh Civil Rights Act is set forth in Civil Code section 51 et seq., and the Ralph Civil Rights Act is set forth in Civil Code section 51.7. Only application of the FEHA was considered in creating the foregoing list of practical tips for employees. Employers must also comply with other state and federal laws when implementing layoffs.
5. 29 U.S.C. § 621 et seq.
6. 29 U.S.C. §§ 623, 626(f).

California Layoff Basics—
Two Perspectives (Employers)
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SEVERANCE AGREEMENTS

California law does not require an employer to provide severance pay to an employee. However, it might be a good idea to help ease the transition of former employees as well as provide the company “insurance” against future lawsuits. Requiring employees to sign a release in exchange for severance can reduce claims, but the release agreement needs to be written properly and take into account mandatory provisions required under the Older Worker's Benefits Protection Act if age claims are to be waived or released.⁶ Depending on a number of factors, the severance agreement can range from very simple to all-encompassing. If multiple rounds of layoffs are foreseeable, then standardizing the severance and release agreement is a good idea to keep the process consistent and objective.

While the ultimate goal is to comply with the law, most employers also want to be as fair and humane as possible when laying off employees. There is a sense out there that we are all in this together, so handling layoffs properly can avoid not just actual unfairness and discrimination, but the *appearance* of unfairness and discrimination. And that is truly important as we move forward to what hopefully will be a better economic climate. ⁴

The Pyett Decision

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outcome favoring an independent right of action, the Court pointed to the potential for conflict between a union and an individual employee, and to the limits of an arbitrator's expertise in CBAs. *Gardner-Denver* found that the rights established by anti-discrimination law cannot be bargained away, “since waiver of these rights would defeat the paramount congressional purpose. . . .”¹⁷ Summing up, the Court viewed the task of a labor arbitrator as deciding “the law of the shop, not the law of the land.”¹⁸

Justice Thomas, however, construed *Gardner-Denver's* holding as limited to whether the plaintiff's discrimination lawsuit was barred by a CBA arbitration provision that did not cover statutory claims.¹⁹ From this premise, the majority reasoned that *Gardner-Denver's* broad criticism of arbitration had been outpaced by later case developments approving arbitration under the FAA, as long as arbitration protected an employee's substantive rights.²⁰ In addition, should there be a conflict between a union and an individual, the

Pyett majority views employees as having recourse in actions against the union alleging a breach of the duty of fair representation. Where warranted, the union also may be joined as a defendant in a discrimination lawsuit.²¹

In separate dissents, Justices Stevens and Souter challenged the majority's narrow reading of the *Gardner-Denver* precedent to legitimize the waiver.²²

Pyett left in its wake a series of intriguing legal issues, as a few examples illustrate. One concerns the dividing line between FAA proceedings and section 301, the traditional basis for enforcing CBAs. *Pyett* did not directly address this issue. Although the case involved the application of a CBA provision, the employer had advanced the FAA as the basis for its original motion in the district court. If it turns out that the FAA is the governing law, that could portend a weakening of our national body of law dealing with labor relations, and a return to traditional state-based contract doctrines that can be applied as a matter of procedure under the FAA.²³

Another legal issue is deciding whether an arbitration provision amounts to a “clear and unmistakable” waiver, particularly if a union controls access to the arbitration remedy and will

not take the case, as in *Pyett*. The majority in *Pyett* found that a challenge to the clarity of the CBA waiver had been raised belatedly and was forfeited, and the issue of the union's control over access to arbitration had not been fully litigated, thus declining to resolve this question.²⁴ It could take years of litigation and appeals to lift these clouds over the *Pyett* decision.

A third legal uncertainty is how a waiver, if found, will affect related aspects of discrimination cases, such as administrative remedies and judicial review. Presumably, under *EEOC v. Waffle House*,²⁵ employees still have access to an administrative forum to resolve discrimination claims. However, it remains to be seen if the scope of judicial review of arbitration decisions on statutory claims will be broader than the usual narrow standard for reviewing labor arbitration awards.²⁶

Another issue, if bargaining does not result in an agreement to include a provision that applies to individual discrimination claims, is whether an employer can impose it unilaterally once reaching an impasse with the union. Under current law, an employer may not impose traditional grievance arbitration on unions after impasse.²⁷ Will arbitration of individual claims be viewed

differently?

Legal issues aside, in considering the practical implications of *Pyett*, the ultimate question is whether there will be sufficient incentives for labor and management to negotiate CBA arbitration provisions that cover all discrimination claims, regardless of individual preferences.

Looking to the possible benefits of arbitration, it is no surprise that some, particularly on the employer side, will see *Pyett* as a victory. Supported by a CBA waiver negotiated with a union, an employer can have a discrimination claim resolved in one forum, not two, as is sometimes now the case. Generally, well-administered arbitration is more economical and faster than court litigation, without the often disruptive and intrusive burdens of full-fledged civil discovery. As for remedies, a carefully selected arbitrator may be a better decision-maker than a jury in determining an appropriate award, including whether punitive damages are warranted. For employees, a CBA waiver also might increase the chances for some employees to have their claims heard where it might otherwise be difficult to secure legal counsel for a lawsuit.

In the long run, however, there are significant limits on *Pyett's* impact, and several disincentives for labor and management to negotiate new, expanded arbitration provisions. At one level, the number of employees in unionized positions is about 12.5 percent overall, and only about 7.5 percent in the private sector.²⁸ The vast majority of millions of U.S. workers are simply beyond *Pyett's* reach.

Apart from the limits in pure numbers, management interested in securing arbitration coverage for individual claims will have to give something up—added money or something else of value—for broader coverage. Absent such language, the clear-and-unmistakable dividing line followed by the Court in *Pyett* means that the generalized non-discrimination provisions found in most CBAs will not be specific enough to supplant litigation. A chilling factor for any immediate CBA negotiations on the subject is the prospect that a Democrat-controlled Congress may extend a ban on mandatory arbitration of individual claims now proposed in the Arbitration Fairness Act of 2009,²⁹ to prohibit CBA

waivers.

Quite apart from pending legislation, it is likely that negotiating new, broader language probably will require an unacceptable sacrifice for most employers. Weighing against the prospect could be a concern that an expanded arbitration provision gives a union another tool to use against an employer if there is an antagonistic relationship. The flip side of expanding access for employee claimants is that the screening process which requires plaintiffs to find legal counsel for litigation would lose its effectiveness in weeding out poor cases. Compounding this problem, an employer in arbitration probably would be sacrificing built-in litigation opportunities to defeat weaker claims on summary judgment or through a full appeal on the merits.

The parties can also expect that a union faced with a proposal for new language will be reluctant to agree. A union under *Gardner-Denver* could pursue a discrimination claim under a CBA, but without tying an employee's hands in terms of a later lawsuit. Now, under a *Pyett*-type clause confining a

claim to the CBA forum, a union will have a heightened concern about potential employee charges that the union breached its duty of fair representation, either by not pursuing the case at all, as in *Pyett*, or by failing to allocate sufficient resources to handle the case effectively. It is not easy for individual employees to secure relief in fair representation cases under existing doctrine,³⁰ but the mere filing of a lawsuit can be costly to defend for both a union and an employer drawn into the fray.

A union may also be apprehensive, as might management, that traditional labor arbitration could be transformed. This prospect would arise not only by applying time limits for filing statutory claims much longer than those for internal grievance steps, but with a more cumbersome, attorney-dominated process that shifts the focus of a labor arbitration from collective union and business interests to those of an individual. Financial burdens could also be shifted, as is the prospect in California, where employers must pay for arbitration of individual claims arising from mandatory agreements.³¹

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In the end, although *Pyett* opens the door for change, many in the labor-management field probably will be content, at least for the foreseeable future, to stay the course that has evolved over the past few decades. Under *Gardner-Denver*, if a CBA-based arbitration takes place, an employer can defend in court by arguing that weight should be given to the prior award on the same facts, especially if the decision is thorough in its findings and conclusions.³²

Management can also rely on the preemption doctrine that is a facet of section 301 jurisprudence. Under this approach, if resolving an individual's statutory claim requires interpretation of the CBA, a court should decline jurisdiction and possibly require exhaustion of the CBA remedy.³³ With these alternatives remaining in effect, labor and management have significant flexibility in handling discrimination or other statutory claims without being required to negotiate for a class of cases that most CBA systems are not designed to accommodate.^{41a}

ENDNOTES

1. 556 U.S. ____, 129 S.Ct. 1456 (2009). The facts considered in this article are drawn from the Supreme Court decision, and from the lower court rulings: *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007) and *Pyett v. Pennsylvania Bldg. Co.*, 2006 U.S. Dist. LEXIS 35952, 2006 WL 1520517 (SDNY 2006). In advance of oral argument, the author also wrote, *A New Day Dawning or Dark Clouds on the Horizon? The Potential Impact of the Pyett Case*, 59 Lab.L.J. 227 (Oct. 2008). The author contributed to preparation of an amicus brief in *Pyett* that was filed by the National Academy of Arbitrators. The views expressed in this article are solely those of the author, and not of the Academy.
2. 415 U.S. 36 (1974). Other decisions by the Court that followed *Gardner-Denver* also were distinguished: *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) and *McDonald v. City of West Branch*, 466 U.S. 284 (1984). (See *Pyett*, slip. op. at 13-15.)
3. The full text of the relevant portion of the CBA states:

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law,

- including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.
4. *Pyett*, slip op. at 1.
 5. *Pyett*, slip op. at 6-8. The National Labor Relations Board has ruled that mandatory arbitration plans covering individual claims of discrimination are subject to the duty to bargain and cannot be imposed unilaterally. (*Utility Vault Co.*, 345 NLRB No. 4 (2005).) The Board also has disapproved employer-adopted arbitration plans that potentially interfere with protected rights under section 7 of the National Labor Relations Act and the filing of unfair labor practice charges. (See *Bill's Elec., Inc.*, 350 NLRB No. 31 (2007); *U-Haul*, 347 NLRB No. 34 (2006).) An appellate decision rejecting mandatory arbitration plans as being within the scope of bargaining under the Railway Labor Act is *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1998).
 6. 500 U.S. 20 (1991).
 7. *Pyett*, slip. op. at 8-11.
 8. 525 U.S. 70 (1998).
 9. *Pyett*, slip. op. at 24.
 10. The FAA is codified at 9 U.S.C. section 1 et seq. In addition to the *Gilmer* decision cited *supra*, n. 6, other important FAA arbitration decisions relied on in *Pyett* include *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).
 11. 346 U.S. 427 (1953) (arbitration of securities act claim unenforceable).
 12. *Pyett*, slip op. at 17-18.
 13. 29 U.S.C. § 301. This provision was part of the Taft-Hartley legislation of 1947 that amended the National Labor Relations Act. In *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), the Court applied section 301 to extend to federal courts the authority to enforce

- the executory promise to arbitrate in collective bargaining agreements as an element of a nationwide common law of labor relations. This provided a jurisdictional grounding for labor arbitration other than the FAA. (Also see *id.*, 353 U.S. at 466-67 (Frankfurter, J., dissenting).)
14. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Just as the *Lincoln Mills* decision permitted judicial enforcement of the promise to arbitrate, the *Trilogy* limited judicial scrutiny by presuming arbitrability in actions to compel arbitration and by strictly confining the scope of post-arbitration judicial review.
 15. *Warrior & Gulf*, *supra*, 363 U.S. at 578.
 16. *Gardner-Denver*, *supra*, 415 U.S. at 49-51.
 17. *Id.*, 415 U.S. at 51.
 18. *Id.*, 415 U.S. at 57.
 19. *Pyett*, slip op. at 11-13.
 20. *Pyett*, slip op. at 16-17.
 21. *Pyett*, slip op. at 21-23.
 22. *Pyett*, slip op. at Stevens (dissenting), Souter (dissenting).
 23. Under section 2 of the FAA (9 U.S.C. § 2), an agreement to arbitrate, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
 24. *Pyett*, slip op. at 23-25.
 25. 534 U.S. 279 (2002).
 26. The majority observed that judicial review remained available for arbitration of individual statutory claims, but it did not spell out the nature of that review. (*Pyett*, slip op. at 20, n.10.)
 27. See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991).
 28. The annual figures recording union membership can be found at the website of the U.S. Department of Labor's Bureau of Labor Statistics: www.bls.gov/news.release/union2.toc.htm.
 29. H.R. 1020.
 30. See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991).
 31. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000).
 32. *Gardner-Denver*, *supra*, 415 U.S. at 60, n.21.
 33. See, e.g., *Livadas v. Bradshaw*, 512 U.S. 108, 121-24 (1994). See also *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1998); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

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Name _____	Bar Number _____	E-mail _____
1) In <i>14 Penn Plaza v. Pyett</i> , 556 U.S. ____, 129 S.Ct. 1456 (2009), the U.S. Supreme Court held that a union could waive its members’ right to litigate discrimination claims in court. <input type="checkbox"/> True <input type="checkbox"/> False		11) Known as the <i>Steelworkers Trilogy</i> , <i>United Steelworkers v. American Mfg. Co.</i> , 363 U.S. 564 (1960), <i>United Steelworkers v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574 (1960) and <i>United Steelworkers v. Enterprise Wheel & Car Corp.</i> , 363 U.S. 593 (1960), all view labor arbitration as a substitute for the right to strike. <input type="checkbox"/> True <input type="checkbox"/> False
2) Under <i>Pyett</i> , a union’s collective bargaining agreement’s arbitration clause cannot be binding on union members. <input type="checkbox"/> True <input type="checkbox"/> False		12) In <i>Gardner-Denver</i> , the Supreme Court found that an employee’s discrimination lawsuit was barred by a previous labor arbitration award that had upheld the employee’s termination. <input type="checkbox"/> True <input type="checkbox"/> False
3) The <i>Pyett</i> opinion follows <i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974), which found no bar to labor and management negotiating a waiver of an employee’s right to bring a discrimination lawsuit against an employer. <input type="checkbox"/> True <input type="checkbox"/> False		13) Favoring an independent right of action, the <i>Gardner-Denver</i> Court ruled that anti-discrimination law rights cannot be bargained away. <input type="checkbox"/> True <input type="checkbox"/> False
4) The collective bargaining agreement, which the <i>Pyett</i> opinion held binding on union members who filed suit, prohibited employment discrimination based on any characteristic protected by law, and provided that discrimination claims made under specific federal and state laws “shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations.” <input type="checkbox"/> True <input type="checkbox"/> False		14) <i>Pyett</i> held that post- <i>Gardner-Denver</i> case developments approving arbitration under the FAA support binding arbitration, as long as an employee’s substantive rights are protected. <input type="checkbox"/> True <input type="checkbox"/> False
5) The National Labor Relations Board (NLRB) has ruled that mandatory arbitration plans covering individual discrimination claims can be imposed unilaterally. <input type="checkbox"/> True <input type="checkbox"/> False		15) The <i>Pyett</i> majority determined that a binding arbitration clause in a union’s collective bargaining agreement does not deprive an employee from suing the union for breach of the duty of fair representation or joining the union as a defendant in a discrimination lawsuit. <input type="checkbox"/> True <input type="checkbox"/> False
6) The NLRB has approved of employer-adopted arbitration plans that potentially interfere with employees’ protected rights under section 7 of the National Labor Relations Act and the filing of unfair labor practice charges. <input type="checkbox"/> True <input type="checkbox"/> False		16) The <i>Pyett</i> majority opinion directly addressed the dividing line between FAA proceedings and section 301 of the LMRA. <input type="checkbox"/> True <input type="checkbox"/> False
7) Writing for the majority in <i>Pyett</i> , Justice Clarence Thomas determined that an employee’s substantive right to be protected against discrimination was not modified by limiting the employee’s forum to arbitration. <input type="checkbox"/> True <input type="checkbox"/> False		17) Under current law, an employer may not impose traditional grievance arbitration on unions after impasse. <input type="checkbox"/> True <input type="checkbox"/> False
8) The <i>Pyett</i> opinion holds that a collective bargaining agreement’s explicit waiver of the right to file suit is binding on employees subject to the agreement. <input type="checkbox"/> True <input type="checkbox"/> False		18) The <i>Pyett</i> majority stated that judicial review still remains available for arbitration of individual statutory claims. <input type="checkbox"/> True <input type="checkbox"/> False
9) Prior to the <i>Pyett</i> decision, the Supreme Court favored compelling arbitration under the Federal Arbitration Act (FAA) as a substitute for litigation, regardless of whether an employee voluntarily agreed to binding arbitration. <input type="checkbox"/> True <input type="checkbox"/> False		19) In accordance with <i>Gardner-Denver</i> , <i>Pyett</i> continues to restrict employees’ discrimination claims to an arbitration forum, prohibiting employees from later filing employment discrimination lawsuits against their employers. <input type="checkbox"/> True <input type="checkbox"/> False
10) Section 301 of the Labor-Management Relations Act (LMRA) provides a separate basis from the FAA for the judiciary to enforce arbitration clauses in collective bargaining agreements. <input type="checkbox"/> True <input type="checkbox"/> False		20) In California, employers must pay for arbitration of individual claims arising from mandatory agreements. <input type="checkbox"/> True <input type="checkbox"/> False

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California Whistleblower Protection Act

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the SPB pursuant to the CWPA, alleging that she had been retaliated against for having reported improper governmental activities (i.e., the failure of the SBCE to issue a citation to a chiropractor practicing without a valid license). After the SPB accepted Arbuckle's whistleblower retaliation complaint, the matter was assigned for review under the Notice of Findings review process. The SPB's Executive Officer investigated the complaint in accordance with the SPB's regulations, during which time each side submitted detailed documentary evidence and briefs. After reviewing the matter, the Executive Officer issued a sixteen-page Notice of Findings, recommending that the complaint be dismissed because the alleged whistleblowing activities did not constitute protected disclosures, and because an insufficient nexus existed between the protected disclosures and the complained-of employment actions.

After receiving the Notice of Findings, Arbuckle filed a civil complaint against the SBCE and its Executive Director in the Sacramento County Superior Court, pursuant to Government Code section 8547.8(c).⁹ The defendants moved for summary judgment, arguing that Arbuckle had failed to exhaust her administrative and judicial remedies. After the superior court denied the motion, the SBCE appealed to the Third District Court of Appeal. That court issued an alternative writ of mandate and stayed the trial court proceedings.

The court of appeal thereafter held that Arbuckle had failed to exhaust both her administrative and judicial remedies. In so deciding, the appellate court found that Arbuckle was first required to appeal the SPB Executive Officer's findings to the SPB and, if unsuccessful in that venue, to then seek to have the Executive Officer's findings set aside by means of a writ of administrative mandate filed in superior court.¹⁰ Because Arbuckle failed to do so, the court of appeal found that the Executive Officer's findings were binding in any subsequent civil action, and that

the trial court should therefore have granted the defendants' motion for summary judgment.

In reversing the court of appeal, the California Supreme Court found that the appellate court had incorrectly read into section 8547.8(c) a requirement that the complaining employee must petition the SPB for a hearing before an ALJ if dissatisfied with the Executive Officer's findings, and, if unsuccessful in that petition, to seek a writ of administrative mandate in the superior court to set aside those adverse findings. As the court noted, although "exhausting all possibilities for relief at the administrative level is generally a prerequisite to obtaining judicial review of administrative findings [citation] . . . section 8547.8(c) lacks language making this administrative exhaustion a prerequisite to bringing the specific type of damages action permitted under that provision."¹¹ The court further noted that the plain language of section 8547.8(c) makes clear that the statute does not contemplate judicial review of those findings made by the Executive Officer pursuant to section 19683; instead, section 8547.8(c) contemplates that the complainant can file a completely separate damages action in superior court, regardless of whether the Executive Officer determined that no retaliation had occurred.

In short, the supreme court determined that in those cases where the Executive Officer fails to issue findings within sixty working days, as required by section 19683(a), the complainant is entitled to discontinue participation in the Notice of Findings process and to file a separate civil complaint for damages in superior court. Similarly, the court determined that in cases where the Executive Officer does issue findings adverse to the complainant, the complainant is entitled to file a civil complaint for damages in superior court, where the Executive Officer's findings will be afforded no preclusive effect.

QUESTIONS LEFT UNANSWERED BY ARBUCKLE

The *Arbuckle* decision provides useful guidance with respect to a relatively straightforward issue: Is a complainant entitled to file a civil complaint in superior court after the SPB Executive Officer determines that no

retaliation has occurred? The answer to that question is clearly "yes." Nevertheless, several significant jurisdictional questions still remain with respect to the adjudication of whistleblower retaliation complaints. As an initial matter, the decision does not address what becomes of those complaints that are not processed through the Notice of Findings process, but instead are consolidated with other appeals pending before the SPB, as authorized by section 19683.¹²

Consolidated cases are generally assigned for a full administrative evidentiary hearing before an ALJ, after which a decision concerning the matter is issued by the SPB. In such cases, no "findings" on the whistleblower retaliation complaint are ever issued by the Executive Officer. The question that arises, therefore, is whether complainants whose complaints are consolidated with other appeals pending before the SPB are precluded from filing a civil complaint in the superior court pursuant to the provisions of section 8547.8(c). On the one hand, such an interpretation seems logical, given the plain language of section 8547.8(c), which contemplates that a civil complaint may be filed only if the Executive Officer issues, or fails to issue, findings concerning the complaint within sixty working days.

Section 19683(a), however, implicitly acknowledges that consolidated complaints are not subject to "findings" by the Executive Officer, and expressly provides that consolidated complaints are not subject to a sixty-working-days limitations period. Hence, an argument exists for the proposition that whistleblower retaliation complaints that are consolidated with other appeals are not subject to the civil complaint process set forth in section 8547.8(c), and that a separate administrative hearing process governs such cases. On the other hand, it seems wholly anomalous to permit one complainant access to a civil complaint in superior court if her complaint to the SPB is assigned to the Notice of Findings process, but to preclude another complainant access to a civil complaint simply because she had another appeal pending before the SPB.

A similar question arises with respect to those situations where the Executive Officer issues a Notice of

Findings that concludes the complainant has been retaliated against. Pursuant to Government Code section 19683(b), in those instances where the Executive Officer finds that a state employer or state employee engaged in retaliatory acts under the CWPA, the employer and/or employee is entitled to request a full administrative evidentiary hearing before an ALJ to dispute the Executive Officer's findings.¹³ The unanswered question in such situations is whether the complainant's right under section 8547.8(c) to file a civil complaint in superior court after the Executive Officer issues his or her findings is superseded by the alleged retaliator's right to request an administrative hearing pursuant to section 19683(b). No guidance exists with respect to that issue.

Additionally, if it is determined that the complainant is required to go through the administrative hearing process, will she thereafter be permitted to file a civil complaint in superior court pursuant to section 8547.8(c), or will she be required to litigate the propriety of the Board's decision by means of a writ of administrative mandate proceeding? Again, no guidance exists on that issue.

Closely related is the issue of what occurs in those situations where the Executive Officer issues findings in which he or she concludes that some, but not all, of the complainant's actions constituted protected disclosures, and/or that some, but not all, of the alleged retaliatory acts constituted improper employment actions. Will the complainant be entitled to immediately file a civil complaint in superior court concerning all of her allegations, irrespective of the alleged retaliator's seeming right under section 19683(b) to demand an administrative evidentiary hearing concerning those actions found to have been retaliatory? Or, will the complainant only be permitted an opportunity to immediately file a civil complaint in superior court concerning those allegations dismissed by the Executive Officer? Or, will the complainant be required to go through the administrative hearing process, and only thereafter file her civil complaint in superior court? Or, will the complainant be required to go through the administrative hearing process, and thereafter be required to litigate the

propriety of the SPB's decision by means of a writ of administrative mandate proceeding?

Clearly, although *Arbuckle* certainly answered one large jurisdictional issue concerning the whistleblower retaliation complaint process, a number of significant jurisdictional issues still remain open to question. Moreover, a number of other equally significant issues within the CWPA remain unanswered by the courts, including:

- What constitutes an improper "personnel action" under section 8547.3?
- Must each alleged retaliatory act be sufficiently significant so as to constitute a discrete, insular act before it will be deemed a cognizable improper personnel action, or can a series of relatively minor acts which, when viewed in totality, would constitute the proverbial "death by 1,000 cuts," be deemed cognizable improper personnel actions?
- Are any alleged retaliatory acts that occur outside of the twelve-month limitation period automatically dismissed, or are they subject to the continuing violations doctrine, or are they considered timely filed so long as the last retaliatory act occurred within the twelve-month limitation period?

Given the foregoing, it is reasonable to assume that *Arbuckle* will not be the last word from the courts concerning the appropriate interpretation of the CWPA. ¹⁴

ENDNOTES

1. Gov't Code § 8547 et seq.
2. 45 Cal. 4th 963 (2009).
3. Employees and applicants for employment with the University of California and the California State University are required to submit their whistleblower retaliation complaints directly with the University of California or the California State University. (Gov't Code §§ 8547.10, 8547.12.) Similarly, local school district employees are required to file their whistleblower retaliation complaints either directly with the local school district, or with local law enforcement. (Educ. Code

§ 44110 et seq.) Community college employees and applicants for community college employment, on the other hand, are authorized to file their whistleblower retaliation complaints with the SPB. (Educ. Code § 87164.)

4. Gov't Code § 8547.8(a).
5. Gov't Code § 8457.8(e). Government Code section 8547.2(d) defines a "protected disclosure" to mean "any good faith communication that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity; or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition." Government Code section 8547.2(b) defines an "improper governmental activity" to mean "any activity by a state agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that action is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency."
6. Gov't Code § 8457.8(e).
7. Gov't Code § 19683(a). *See also* Cal. Code Regs. tit. 2, § 56.2.
8. *Id.* The sixty-working-days limitation period is not applicable to those complaints consolidated with other appeals pending before the SPB.
9. *Arbuckle* declined to appeal the Executive Officer's findings to the five-member SPB, as was her right under the SPB's regulations in effect at that time.
10. Civ. Proc. Code § 1094.5.
11. 45 Cal. 4th at 973.
12. Gov't Code § 19683(a) provides: "The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 8547.3 within 10 working days of its submission. The executive officer shall complete findings of the hearing or investigation within 60 working days thereafter, and shall

provide a copy of the findings to the complaining state employee or applicant for state employment and to the appropriate supervisor, manager, employee, or appointing authority. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this subdivision shall not apply.” (Emphasis added.)

13. Gov’t Code § 19683(b) provides: “If the executive officer finds that the supervisor, manager, employee, or appointing power retaliated against the complainant for engaging in protected whistleblower activities, the supervisor, manager, employee, or appointing power may request a hearing before the State Personnel Board regarding the findings of the executive officer. The request for hearing and any subsequent determination by the board shall be made in accordance with the board’s normal rules governing appeals, hearings, investigations, and disciplinary proceedings.”

Pearson Dental Supplies, Inc.

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cannot be said that the DRA’s statute of limitations was unconscionable or oppressive, or denied him any fundamental rights.

The appellate court also noted that while the FEHA’s statute of limitations is two years, as a practical matter plaintiffs such as Turcios often file complaints within the one year provided by the DRA. In this regard, the court distinguished the earlier court of appeal decision in *Martinez v. Master Protection Corp. (Martinez)*,⁶ in which an arbitration agreement required the claimant to set forth his claims within six months. The *Pearson* decision noted that the DRA’s one-year statute of limitations does not have the “severity of the truncated limitation period involved [in *Martinez*]: six months as opposed to one year here.”⁷

Was the court’s decision unduly influenced by the fact that the plaintiff in *Pearson* happened to file his lawsuit within the DRA’s statute of limitations? Must we then wonder what would have

happened if he had waited until just before one year had passed from the issuance of the right-to-sue letter, a wait permissible under the FEHA, but beyond the DRA’s one year?

As noted, the *Pearson* court distinguished *Martinez* in light of the much shorter limitations period. Yet, the *Martinez* holding appears to be fundamentally different from *Pearson*, and provides a stark contrast to the *Pearson* result. As in *Pearson*, the plaintiff in *Martinez* filed an action in court despite the fact that he had agreed to arbitrate all disputes with his employer. The employer filed a petition to arbitrate, which was granted over the plaintiff’s objection. Unlike *Pearson*, however, in *Martinez*, even though the arbitration clause had a short six-month limitations period, the defendant did not prevail on summary judgment by asserting that the claim was filed too late. Rather, the claim was arbitrated on its merits, and the arbitrator ruled for the defendant. The plaintiff sought to vacate the arbitration award, contending that the arbitration agreement was unenforceable because it was both procedurally and substantively unconscionable. The trial court declined to vacate the award, and the

From the Editors

INVITATION TO COLLABORATE DURING THE CIVIL RIGHTS YEAR



The year 2009 is the 50th Anniversary of the California Fair Employment and Housing Act (FEHA). The State Bar Labor & Employment Law Section and the California Department of Fair Employment & Housing will be co-sponsoring many programs to mark this important milestone during the year. Throughout 2009, look for articles and special features in each issue of the Law Review with a special focus on the FEHA.

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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.

plaintiff appealed. The court of appeal reversed, holding that the arbitration agreement was both procedurally and substantively unconscionable, and was “permeated with illegality.”⁸

The *Martinez* decision discusses a number of reasons why the arbitration agreement was substantively unconscionable, which do not concern the limitations period.⁹ The relevant part of the decision is the holding that the six-month limitations period “unlawfully restricts an employee’s ability to vindicate his civil and statutory rights.”¹⁰ The *Martinez* court, in contrast to *Pearson*, states unequivocally that if an arbitration agreement purports to require employees to arbitrate statutory claims—such as claims for wages under the Labor Code or claims for age discrimination under the FEHA—then the arbitral limitations period must be at least as long as the analogous limitations period in the

statute. If it is not, then the agreement is “unconscionable and insufficient to protect [the] employees’ right to vindicate their statutory rights.”¹¹

A full reading of *Martinez* calls into question the *Pearson* court’s attempt to distinguish it. As noted, the *Pearson* court attempts to distinguish *Martinez* by noting the shorter limitations period in *Martinez*. Yet a fair reading of *Martinez* suggests that the court would have struck down the one-year period discussed in *Pearson*, or any period shorter than the one provided by statute. The difference between the two decisions is not that one case had a one-year limitations period and the other had a six-month period; the difference is that one holds that it is unconscionable to force an employee through an arbitration agreement to give up substantive rights, including the full length of a limitations period, and the other does not.

It is on this point that the California Supreme Court will need to provide guidance. The *Pearson* appellate court appeared to rest its decision, at least in part, on the relatively smaller oppressiveness of one year versus six months. The court seemed to say that the one-year provision of the DRA was close enough to the the FEHA statute of limitations to be enforceable, especially since as a matter of practice many plaintiffs do not avail themselves of the full two years under FEHA. By contrast, the *Martinez* decision appears to state that the trial court need not engage in a determination of whether a period shorter than the one provided by statute is close enough—if it is shorter than the statutory limitations period, it is unconscionable and unenforceable.

Hopefully, having granted review, the state supreme court will clarify for employees and employers exactly how much, if at all, an arbitral statute of limitations may differ from the analogous statutory limitations period. This will assist counsel not only in litigating the enforceability of arbitration agreements, but also in drafting enforceable arbitration agreements. After all, while it may be tempting for an employer to draft an arbitration provision with a very short limitations period in the hope of avoiding claims, the employer will face uncertainty if there is no way to know whether the shorter period will withstand judicial scrutiny. The court has the opportunity to make clear whether any deviation from the statutory provision is valid, and without question the legal community will be most eager to learn the court’s answer. ¹²

ENDNOTES

1. *Review granted*. Previously published at 166 Cal. App. 4th 71 (2008).
2. Cal. Gov’t Code § 12900.
3. *Id.* at §§ 12960(d) and 12965(b).
4. 24 Cal. 4th 83 (2000).
5. 82 Cal. Rptr. 3d at 159.
6. 118 Cal. App. 4th 107 (2004).
7. 166 Cal. App. 4th at 84.
8. *Id.* at 114.
9. Because these reasons do not pertain to the present discussion, they will not be referenced here.
10. *Id.* at 117.
11. *Id.* at 118.

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Employment Law Case Notes

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with a public issue (i.e., “the pursuit of lawful employment pursuant to Business and Professions Code section 16600” as well as “workforce mobility and free competition”). The trial court denied HBW’s anti-SLAPP motion, and the court of appeal affirmed, holding that because the statements at issue were “merely incidental to WFG’s claims, they are insufficient to subject any cause of action, much less the entire complaint, to the anti-SLAPP law.” *Compare Hansen v. California Dep’t of Corr. & Rehab.*, 171 Cal. App. 4th 1537 (2009) (former employee’s whistleblower lawsuit was properly stricken under anti-SLAPP statute).

Former Employee Proved No Damages As a Result of Alleged Defamation

Nethercutt Collection v. Regalia, 172 Cal. App. 4th 361 (2009)

Michael Regalia sued The Nethercutt Collection for wrongful termination and slander after he was terminated as its president. The jury rejected the wrongful termination claim, but awarded Regalia \$750,000 in damages for “assumed harm” to his reputation arising from two statements attributable to the employer:

(1) that Regalia had demanded a commission or finder’s fee of about \$230,000 to which he was not entitled and (2) that Regalia was fired because other employees would not work for him and/or would leave if he remained employed. The court of appeal reversed the judgment on the ground that because Regalia had not proved slander per se (i.e., statements that would injure him in respect to his office, profession, trade or business, etc.), he was required but had failed to prove actual damages.

Medical Service Representatives May Not Have Been Subject to the Motor Carrier Exemption From Overtime

Gomez v. Lincare, Inc., 173 Cal. App. 4th 508 (2009)

Lincare provides respiratory services and medical equipment setup to patients in their homes. Plaintiffs were Lincare service representatives who drove vans containing liquid and compressed oxygen (defined by the federal government as “hazardous materials”), and worked on call in the evenings and on weekends. Plaintiffs sought compensation for the on-call time they spent resolving customer questions by telephone and for all the time they were on call, even when they were not responding to customer calls. The trial court granted Lincare’s motion for summary adjudication on the ground that plaintiffs were covered by the motor carrier exemption and therefore were exempt from California’s overtime law. The court of appeal reversed, holding

that Lincare had failed to prove that each plaintiff drove a vehicle containing hazardous materials for some period of time on each and every workday. The court also held that plaintiffs had sufficiently alleged the breach of an express contract (so Lincare’s demurrer should not have been sustained). The court affirmed summary adjudication of plaintiffs’ claims for failure to pay for on-call time worked after a less-than-eight-hour-weekday shift and for breach of an implied-in-fact contract.

Detention Officers’ State Law Wage Claims Were Not Subject to Exclusive Federal Remedy

Naranjo v. Spectrum Sec. Servs., 172 Cal. App. 4th 654 (2009)

Gustavo Naranjo worked as a detention officer for Spectrum, which provides security services in holding facilities and detention centers throughout Los Angeles County under a contract with federal Immigration and Customs Enforcement (ICE). The terms of Spectrum’s contract with ICE rely on wage and fringe benefit determinations by the Secretary of the U.S. Department of Labor pursuant to the McNamara-O’Hara Service Contract Act of 1965 (SCA). (41 U.S.C. §§ 351–358.) In this putative class action, Naranjo alleged violations of the California Labor Code involving meal and rest period requirements, failure to pay additional compensation upon the resignation or discharge of employees, and failure to provide employees with



"As a nation, we are best served when all of our citizens have the opportunity to contribute their talent, ideas and energy to the workforce."

~ Kenneth S. Apfel, Commissioner of Social Security, Disability Community Briefing October 20, 1999

itemized records of their wages and deductions. Spectrum defended on the ground that Naranjo's claims were preempted by the SCA. The trial court agreed and granted Spectrum's motion for summary judgment, but the court of appeal reversed, holding that Naranjo's claims neither conflicted with nor hindered the achievement of the SCA's goals. *Cf. Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) (overtime provisions of Fair Labor Standards Act apply to a business located on an Indian reservation and owned by Indian tribal members); *Ahlmeyer v. Nevada Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009) (the Age Discrimination in Employment Act is the exclusive federal remedy for age discrimination in employment).

Fishing Agreement Providing Employment for Only One Trip Was Enforceable

Day v. American Seafoods Co., 557 F.3d 1056 (9th Cir. 2009)

Jesse Day entered into a contract to work for American Seafoods Co. for one fishing voyage. In this lawsuit, Day sought payment for "unearned wages" for a period of time longer than the single voyage and contended that extrinsic evidence would establish an oral understanding for a longer period. The district court declined to admit parol evidence on the question, and the Ninth Circuit affirmed, holding that "on the basis of the explicit contractual language and the integration clause, the district court [correctly] held that Day could not offer extrinsic evidence to rebut the unambiguous duration agreed upon in the contract."

Labor Commissioner Approves Seasonal Alternative Workweek Schedule

In a March 23, 2009 opinion letter, the Division of Labor Standards Enforcement determined that an employer could adopt a schedule that would rotate between four nine-hour days and one four-hour day during the summer months and five eight-hour days during the rest of the year—so long as the employer complied with the requirements for adopting an alternative workweek as provided in Labor Code section 511 and the applicable Wage Order. See www.dir.ca.gov/dlse/OpinionLetters-byDate.htm. ⁴¹

Wage and Hour Update

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The court of appeal affirmed. Relying on the holding and rationale in *Old Heidelberg*, the court found no "direct table service" requirement for employees who share in a tip pool. The holding in *Old Heidelberg* included bartenders as well as bussers, and the court's rationale for including bartenders in its holding—that they contribute to the service of a patron—extended to all employees who contribute to the service of a patron. The court concluded that policy reasons favor mandatory tip pools that include employees who participate in the chain of service but who do not provide direct table service—such as ensuring that these employees receive their fair share of gratuities and encouraging good service by all employees. Further, the court also agreed with the decision in *Lu* that section 351 does not confer a private right of action for employees to recover tips unlawfully taken by an employer.

Chau v. Starbucks Corp., *supra*, San Diego Superior Court Case No. GIC836925, another tip pooling case, is currently before the Fourth District Court of Appeal. In *Chau*, a certified class of over 100,000 Starbucks baristas challenged their employer's requirement that they pool tips with shift supervisors. Finding that shift supervisors are agents within the meaning of Labor Code section 351, the trial court awarded \$86 million in restitution, prejudgment and post-judgment interest, and issued an injunction. Defendant appealed. The case was argued on May 14, 2009.

Class Action Waiver of Meal and Rest Claims Unconscionable

Franco v. Athens Disposal Co., Inc., 171 Cal. App. 4th 1277 (2009)

Plaintiff, a trash truck driver, filed a class action suit against his former employer for various wage and hour violations, including the denial of meal and rest periods. Defendant responded by filing a petition to compel arbitration based upon a written agreement that purported to waive "any rights to join or consolidate claims in arbitration with

others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity" The trial court held that the plaintiff was exempt from California overtime laws based on evidence that he drove a commercial truck of a certain size and type. Based upon this ruling, the court then found that *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), did not govern because *Gentry* applied to overtime claims.

The court of appeal reversed. It held the trial court had granted the equivalent of a de facto summary adjudication motion on the overtime claims, which amounted to an improper inquiry into the merits at the class certification stage. Thus, plaintiff's overtime claims should have been considered in deciding the validity of the class arbitration provision. The court analyzed the meal and rest claims and determined that, similar to overtime, such claims constitute unwaivable statutory rights under *Gentry*. Applying *Gentry*, the court held the class action arbitration waiver at issue was unconscionable, given the modest size of potential individual recovery, the potential for retaliation against members of the class, and the fact that absent members of the class may be ill-informed about their rights. The court also found that the agreement's prohibition on "private attorney general" claims was also invalid, and could not be enforced to compel plaintiff's PAGA claims to arbitration. The court reversed the petition to compel arbitration.

Labor Code Sections 206 and 206.5 Do Not Prevent Employers and Employees From Settling Bona Fide Disputes Over Past Overtime Wages

Chindarah v. Pick Up Stix, 171 Cal. App. 4th 796 (2009)

Plaintiffs filed a class action to recover unpaid overtime on behalf of all current and former general managers, assistant managers, and lead cooks employed by the restaurant Pick Up Stix. Following a failed mediation, Pick Up Stix negotiated directly with the class members and signed over 200 individual settlement agreements, which included general releases. In an amended complaint, eight current and former employees who had signed settlement agreements joined the proposed class

action as plaintiffs. Pick Up Stix filed a cross-complaint against them and moved for summary judgment, alleging breach of contract and breach of the settlement agreement. Plaintiffs moved for summary adjudication of the cross-complaint, claiming the releases they signed were void under Labor Code sections 206 and 206.5. In granting the employer's motion, the trial court found that the Labor Code did not prohibit the release of a claim for unpaid wages when there is a bona fide dispute over whether any wages were owed.

The court of appeal affirmed the judgment. While recognizing there were no cases directly on point, the court nonetheless reviewed the two that came close: *Reid v. Overland Machined Products*, 55 Cal. 2d 203 (1961) and *Sullivan v. Del Conte Masonry Co.*, 238 Cal. App. 2d 630 (1965). Both cases found that employers and employees could compromise bona fide disputes over wages so long as wages *concededly due* were unconditionally paid.

The *Chindarah* plaintiffs dismissed the *Reid* and *Sullivan* findings as dicta because section 206.5, unlike section 206, does not use the phrase "concededly due" and, thus, must bar the release of *all* disputed wages. The *Chindarah* plaintiffs also urged the court to look to the Fair Labor Standards Act,² which has been interpreted as prohibiting employers from obtaining releases of wage claims directly from employees.

While recognizing the statutory right to receive overtime pay and the underlying public policy embodied in Labor Code section 1194, the court nonetheless found that there is no statute providing that an employee could not release his claim to past overtime wages as part of a settlement of a bona fide dispute over wages. Here, each of the *Chindarah*

plaintiffs signed a settlement agreement in which they acknowledged spending more than 50 percent of their time performing managerial duties. This was indicative of a bona fide dispute over their classification (and whether overtime was due); thus, the settlement agreements were valid.

Denial of Class Certification Improper Where Trial Court Considered Merits in Determining Ascertainability of Class

Ghazaryan v. Diva Limousine, 169 Cal. App. 4th 1524 (2008)

Plaintiffs appealed from the denial of a motion to certify a class of limousine drivers, claiming that defendant's practice of compensating employees by the job rather than the hour resulted in a failure to pay on-call "gap time" between assignments, overtime pay, and meal and rest period premiums. The trial court refused to certify the class based upon evidence that some drivers were paid on an hourly basis, as well as declarations by some drivers who stated that they used their "gap time" for their own purposes.

The Second District Court of Appeal applied a non-deferential standard of review, finding that the trial court had used improper legal standards in analyzing the appropriateness of class treatment under Code of Civil Procedure section 382. The court cited the well-established rule that trial courts should not evaluate the merits of claims when deciding whether class treatment is appropriate. Rather, the focus should be on whether the theory of recovery advanced by the plaintiff is likely to prove amendable to class treatment. The court held that the class was fully ascertainable and section 382's "community of interest" requirement was not defeated by differences in the amount of "gap time" for each driver, or by how drivers spent

such time. "Community of interest" is determined by the "reasonableness of [defendant's] policies as applied to its drivers as a whole." Here, evidence indicated that defendant dictated to a large extent how drivers were permitted to use their "gap time."

Unlicensed Accounting Associates Were Not Administrative, Professional or Managerial Employees, and Thus Were Entitled to Overtime Pay

Campbell v. PricewaterhouseCoopers, LLP, 602 F. Supp. 2d 1163 (E.D. Cal. 2009)

Plaintiffs were unlicensed associates in the Attest Division of PricewaterhouseCoopers LLP (PwC), the largest accounting firm in the world. Plaintiffs brought a class action alleging that PwC misclassified them as exempt employees under California law and failed to pay them overtime. Plaintiffs and defendant brought cross-motions for summary judgment or partial adjudication on the issue of whether members of the plaintiff class were properly classified as exempt from overtime as professional, executive, or administrative employees. The court evaluated each of the three exemption provisions in the governing 2001 wage order (codified at Cal. Code Regs. tit. 8, § 11040(1)(A)(3)) before ultimately granting plaintiffs' motion.

The professional exemption was the crux of the parties' dispute. Plaintiffs were not *licensed* accountants, and thus were not exempt as one of the "enumerated professions" which require licensing. Defendant argued, however, that class members were exempt as "learned professionals" engaged in the practice of accounting. Plaintiffs argued that defendant's interpretation of the regulation rendered the "enumerated professions" subsection of the disputed regulation surplusage (i.e., the two subsections should be read as mutually exclusive).

In trying to divine the meaning of the ambiguous regulation, the court examined the history of the wage order, as well as various interpretive documents. The intent of the Industrial Welfare Commission (IWC), which promulgated the disputed wage order, was ultimately controlling. The court found the IWC intended for the "learned professions" provision to have a broader and different meaning than the "enumerated

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professions” provision, thus employees primarily engaged in accounting (one of the “enumerated professions”) could not be exempt under the “learned professionals” provision.

The court next evaluated whether plaintiffs were exempt as administrative employees, finding that the close supervision of the plaintiffs—supervision statutorily mandated by Business and Professions Code section 5053—rendered plaintiffs non-exempt.

Finally, defendant argued that some plaintiffs met the “executive” exemption by virtue of serving as the “in charge” of engagements. The court dismissed this argument because the teams of employees assembled for a particular engagement were not “recognized departments” and, thus, ineligible to serve as the basis for an “executive exemption” argument.

After concluding that plaintiffs were not exempt under the 2001 wage order, the court went on to suggest that its ruling was ripe for appeal. The court noted that the determination involved a controlling question of law, that there was substantial ground for difference of opinion, and that an immediate appeal from the order would materially advance the ultimate termination of the litigation.

Ninth Circuit Reverses Summary Judgment Where Plaintiffs Tended Sufficient Evidence To Establish Genuine Issue of Fact Regarding Existence of Exemption

Whiteway v. FedEx Kinko’s Office & Print Servs., 2009 U.S. App. LEXIS 5801, 2009 WL 725152 (9th Cir. Mar. 19, 2009)

In this wage and hour class action, plaintiffs appealed from the district court’s grant of summary judgment. The Ninth Circuit reversed, concluding that plaintiffs (Center Managers) had tendered sufficient evidence to establish a genuine issue of fact regarding whether the Center Managers were realistically expected to spend at least half of their time on exempt tasks. The evidence included class member declarations as well as the expert rebuttal of defendant’s proffered statistical analysis. ⁴²

ENDNOTES

1. Cal. Lab. Code §§ 2698–2699.5.
2. 29 U.S.C. §§ 201–219.

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Public Sector Case Notes

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relation to the time spent in his or her position but rather referred to the subject matter or grade level at which the teacher teaches.

The court held that school districts have broad discretion in defining positions within the district in establishing requirements for employment. Within the scope of that discretion, “there is little reason why a district should be unable to define a position as full time if the district concludes that the assignment cannot be as well performed on a part-time basis. No less than in determining the qualifications necessary to render a person competent to perform a particular assignment, this determination falls within the ‘special competence’ of school district officials.” Since the district in this case considered the full-time psychologist to be programmatically what the district needed for students, it was entitled to define the service as “full-time psychologist,” which neither of the senior psychologists was. The court was not impressed with the coincidence that the .8 psychologist and the .2 psychologist services added up to a full-time equivalent position.

An Arbitration Pursued Under a Contract Negotiated Pursuant to the Educational Employment Relations Act Does Not Supersede Mandatory Provisions of the Education Code

Sunnyvale Unified Sch. Dist. v. Jacobs, 171 Cal. App. 4th 168 (2009)

A school district decided to not reelect a probationary teacher. Under the Education Code, the teacher is not entitled to a hearing to challenge that decision. (Educ. Code § 44929.21(b)). However, the school district was a party to a collective bargaining agreement with the California Teachers Association (CTA) that contained a provision protecting bargaining unit members’ rights to participate in the labor organization’s activities. The teacher filed a grievance alleging that the decision to not reelect him was in retaliation for his participation in the activities of the CTA.

The grievance went to arbitration, and the arbitrator found that the teacher’s non-reelection was “motivated by retaliation of the district for [Jacobs’] protected rights under the Collective Bargaining Agreement and related statutes.” The arbitrator ordered the district to reinstate the teacher and to make him whole. Cross-petitions to confirm and vacate the award were filed by the teacher and the district respectively. The district relied upon Education Code section 44929.21(d) and *Board of Education v. Round Valley Teachers Association*, 13 Cal. 4th 269 (1996). The trial court struck the portion of the arbitrator’s order reinstating the teacher and did not address the portion of the award granting back pay and benefits. The parties agreed that the Public Employment Relations Board (PERB) has the power to reinstate a probationary teacher who was not reelected in retaliation for exercising his rights under the Educational Employment Relations Act (EERA). The teacher maintained that since the collective bargaining agreement granted him the same rights he had under the EERA, the PERB would have to defer the charge to the arbitrator for adjudication, and thus the arbitrator has the same remedial authority as the PERB. The court held that *Round Valley* was dispositive of the issue. *Round Valley* “implicitly exempted the nonreelection decision from the permissive scope of collective bargaining by not listing it among the matters subject to bargaining under Government Code section 3543.2, subdivision (a).” The CTA and the teacher argued that *Round Valley* did not apply, since the collective bargaining agreement did not purport to set forth a procedural basis for terminating the employment of a probationary employee. It merely imported substantive rights. The court of appeal held that was too narrow an interpretation of *Round Valley*, and that a school district’s decision not to reelect a probationary employee cannot be the subject of collective bargaining.

In the instant case, the court held that the appropriate remedy would have been to lodge an unfair practice charge with the PERB, which had the statutory authority to adjudicate the allegations and to allow reinstatement if warranted. Thus, the current state of California law is that an

employee who feels that his or her rights under the EERA have been violated should seek relief by filing an unfair practice charge with the PERB, and not a grievance.

PUBLIC SCHOOLS

Protected Activity Under Educational Employment Relations Act

California Teachers Ass’n v. Public Employment Relations Bd. (Journey Charter Sch.) 169 Cal. App. 4th 1076 (2009)

The California Education Code contains the “Charter Schools Act of 1992” (Educ. Code § 47600). Its stated purpose is to create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site. The Public Employment Relations Board (PERB) is charged with taking into account those goals “when deciding cases brought before it related to charter schools” (Educ. Code § 47611.5(d)). The Journey Charter School terminated the employment of three teachers who participated in the drafting of a letter to the parents of students at the charter school, which they then mailed to the parents in envelopes containing the name of the school. The letter described a history of acrimony between the faculty and the administration and the concerns which the teachers had regarding the impact of certain policies upon the students. The letter was written in the context of a dispute concerning the organization of the school and the redrafting of its charter. One of the teachers brought in the California Teachers Association (CTA) for consultation after she and others had been removed from the council, which included both parents and teacher representatives and which had responsibility for all school operations, including hiring and firing. The council permitted the teacher representatives to remain on the council if they agreed to go into mediation. After the letter was sent, the council voted not to renew the contracts of the three teachers.

The CTA filed an unfair practice charge alleging a violation of the teachers’ right to organize. The PERB issued a complaint. The charge and the complaint were later amended to allege that the

teachers were terminated in retaliation for their involvement in sending the letter to parents. The administrative law judge issued a proposed decision which was favorable to the teachers. The charter school filed a statement of exceptions with the PERB. The PERB held that there was no evidence that any representative of the charter school had ever tried to frustrate, thwart, or discourage any attempt to organize under the CTA. The PERB disagreed with the legal conclusion of the administrative law judge that the letter was a protected act under the Educational Employment Relations Act. The PERB acknowledged that although the letter did not address disputed issues in negotiating proposals, the subject of the letter constituted matters of legitimate concern to teachers as employees. However, in the opinion of the PERB, the letter to the parents did not directly address any issue relating to the teachers' interests as employees. Teachers, in the opinion of the PERB, did not state how their complaints impacted their working conditions or how their concerns would advance their interests as employees. Accordingly, it dismissed the complaint.

The CTA petitioned for review of the PERB dismissal. The court reversed the PERB's action, noting that the PERB had failed to consider the "unique role played by the teachers in a charter school and specifically the collaborative role" that the teachers were expected to play in a charter school. The court stated that the policy adopted by the council was an obvious effort to restrict the influence of the teachers and a departure from the "expansive role" the teachers had formerly been expected to play in shaping school policy. In the opinion of the court, the letter was the culmination of an effort to organize the teachers for the purpose of protecting their collective interests as teachers in expressing their "unique perspective" about the events which were unfolding at the school.

The court went on to note that the PERB had failed to recognize that the letter sent by the teachers was protected under the PERB's own precedent. It cited *Mt. San Antonio Community College District* (June 30, 1982) PERB Dec. No. 224. In the *Mt. San Antonio* case, the PERB found that the teachers' association allegation, "while not directly addressing issues and disputes at the bargaining table

nor in the form of negotiating proposals, were nonetheless their comments on matters which were of legitimate concern to teachers as employees." The court rejected the PERB's position that in order to qualify as protected activity, the letter was required to expressly state how all those complaints impacted working conditions or how their concerns would advance their interests as employees.

Vacation Leave and Differential Leave May Not Be Deducted Concurrently

California Sch. Employees Ass'n v. Colton Joint Unified Sch. Dist., 170 Cal. App. 4th 857 (2009)

A classified employee sustained an injury to her knee and was absent for various periods of time. She received worker's compensation benefits. At first, the district deducted the days of absence from the employee's industrial and illness leave and then deducted both vacation leave and differential leave. Although differential leave may be deducted concurrently with sick leave, the issue was whether or not, under Education Code section 45196, the district could deduct vacation leave and differential leave concurrently. Differential leave is 100 days at half pay minus the number of regular sick leave days the employee has accrued. Education Code section 45196 excludes vacation leave from its operation. Thus, the practice of the district in combining vacation leave and differential leave concurrently contradicted section 45196. The practice was invalid notwithstanding the fact that it was agreed to as part of the collective bargaining process.

Effect of a Plea of Nolo Contendere Upon the Termination of a Classified Employee of a School District

Cahoon v. Governing Bd. of Ventura Unified Sch. Dist., 171 Cal. App. 4th 381 (2009)

Under Penal Code section 1016, subdivision 3, a plea of nolo contendere, or "no contest," to a misdemeanor "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." "Civil suit" for these purposes includes an administrative proceeding under the Education Code. In *Cartwright v. Board of Chiropractic Examiners*, 16 Cal. 3d 762

(1976), the California Supreme Court held that a conviction of a chiropractor who had pled nolo contendere to a moral turpitude offense could not be used as an admission in an action involving the revocation of his license. In response to *Cartwright*, a number of licensing statutes were amended to permit a nolo contendere plea or a conviction based thereon as a ground of discipline. Thus, Education Code section 45123, involving classified employees of school districts, was amended in 1990 to provide that a nolo contendere plea to a sex offense "shall be deemed to be a conviction within the meaning of this subdivision." However, the legislature did not provide that no contest pleas to controlled substance offenses were to be deemed to be convictions within the meaning of Education Code section 45123. The court affirmed the granting of a writ of mandate ordering the reinstatement of the school custodian who was terminated after pleading no contest to forging a prescription for a controlled substance. The court noted that "[t]he Legislature clearly knew how to implement a *Cartwright* override on nolo contendere pleas but limited the override to sex offense convictions[.]"

Practitioners who represent certificated employees of public schools should not necessarily take comfort in this decision, which affects only classified employees. Moreover, whether there has been a "*Cartwright* override" as to "serious offenses," such as sex offenses and controlled substance offenses, should be the subject of a separate analysis.

THE BROWN ACT

The Brown Act Does Not Require an Open Hearing by a Governing Board When Deciding Whether or Not to Initiate Teacher Dismissal Proceedings

Kolter v. Commission on Professional Competence, 170 Cal. App. 4th 1346 (2009)

The Brown Act, Government Code section 54950 et seq., governs meetings of administrative agencies such as governing boards of school districts. In the instant case, a school board did not give twenty-four hours' notice to the affected employee prior to meeting in closed session, where it decided that it would send her a notice of intent to dismiss. The

teacher asked for a hearing before a Commission on Professional Competence (Education Code section 44944), but before any evidence was presented, she moved to dismiss the proceeding, arguing that the governing board's action in closed session violated her rights under the Brown Act. The motion to dismiss the proceedings was denied, and at the conclusion of the hearing, the Commission voted to dismiss the teacher. She filed an action for administrative mandamus, arguing she was entitled to prior notice and an open hearing for the meeting at which it was decided that she would be sent a notice of intent to dismiss. The appellate court reviewed the history of the Brown Act and concluded that a public agency may deliberate in closed session, without notice, where the purpose is considering whether complaints or charges brought against the employee justified dismissal or disciplinary action. Once the body decides to take such action, the individual is then entitled to an open hearing and due process.

PUBLIC SAFETY OFFICERS

The Public Safety Officers Procedural Bill of Rights Act Does Not Require That the Decision Maker Be Identified in a Notice of Proposed Discipline

Benefield v. Department of Corrections & Rehab., 171 Cal. App. 4th 469 (2009)

The court of appeal rejected the argument of two correctional officers that the California Department of Corrections violated their rights under the Public Safety Officers Procedural Bill of Rights Act (POBRA; Gov't Code § 3300 et seq.) because the notice of adverse action which was served on them contained the signature of someone other than the person who decided on the level of discipline. Government Code section 19574, which is not part of the POBRA, requires that a formal notice of adverse action be given to an employee prior to the effective date of the disciplinary action. The notice must contain a statement of the nature of the adverse action, the effective date of the action, a statement of the reasons in ordinary language, a statement advising the employee of the right to answer, and a statement advising the employee of a time within which an appeal must be filed.

The writ brought by the correctional officers argued that the POBRA had been violated because of the misleading nature of the notices served upon them. The court disagreed with their contention. "While the original notices were misleading about the identity of the decision maker who had chosen dismissal as the proposed discipline, this fact did not establish a violation of POBRA that could justify relief under Government Code section 3309.5." Nothing in the POBRA guarantees the right to have the notice of discipline signed by the decision maker.

ADMINISTRATIVE PROCEDURE

Civil Service Commission Abused Its Discretion by Reducing a Disciplinary Action

County of Santa Cruz v. Civil Serv. Comm'n, 171 Cal. App. 4th 1577 (2009)

After the Santa Cruz County Sheriff (Sheriff) demoted a sergeant for his conduct during an internal investigation of a female subordinate's gender harassment claim, the Civil Service Commission set aside the demotion of the sergeant and reduced the penalty to a thirty-day suspension. The Sheriff challenged the action of the Civil Service Commission by filing a petition for writ of mandate. The trial court denied the petition, but the action of the trial court was reversed by the court of appeal. The court concluded that the Civil Service Commission abused its discretion by reinstating the employee to his rank of sergeant. The court of appeal applied the abuse of discretion standard. "Reversal is warranted when the administrative agency abuses its discretion, or exceeds the bounds of reason. While the agency has discretion to act, that discretion is not unfettered." The court's opinion stated that the overriding consideration in cases involving employee conduct is the extent to which the employee's conduct resulted in, or if repeated, is likely to result in harm to the public service. Other factors include circumstances surrounding the misconduct and the likelihood of its recurrence. "The public is entitled to protection from unprofessional employees whose conduct places it at risk of injury and the government at risk of incurring liability." In the court's opinion, the employee created a hostile work

environment for a female subordinate. When she complained about her treatment and an investigation ensued, the sergeant disobeyed a direct order to not contact her. When he did contact her, he intimidated her and told her not to tell anyone about the meeting and then lied to a supervisor about it. In the opinion of the court, the employee was dishonest and disobedient and violated the public's trust. He also interfered with an internal investigation. The court also decided that the Civil Service Commission's decision was not supported by its own findings. "Where the Commission made specific findings that are inconsistent with its action in reducing the penalty, our review extends to a de novo comparison of the findings and the penalty such that if the two are inherently inconsistent, and it is not possible that the one could follow from the other, then error is shown."

MEYERS-MILIAS-BROWN ACT

Decision to Lay Off Firefighters Is Not Subject to Collective Bargaining

International Ass'n of Firefighters v. Public Employment Relations Bd. (City of Richmond), 172 Cal. App. 4th 265 (2009)

In October of 2003, officials of the City of Richmond met with the union that represented firefighters to discuss a budget proposal that involved laying off thirteen firefighters. Later, the city reassessed its position and sent notices to eighteen firefighters. In January 2004, the union and the city had a meeting to discuss the effects of the layoff, at which time the union presented a number of proposals dealing with severance pay, compensation, and restoration of sick leave upon reinstatement. Shortly thereafter, the union filed an unfair labor practice charge with the Public Employment Relations Board (PERB), alleging that the city had violated the Meyers-Milias-Brown Act (MMBA; Gov't Code § 3500 et seq.) by failing to meet and confer in good faith over the decision to reduce staffing levels and failing to provide detailed information regarding the city's financial condition. The union requested that the PERB grant injunctive relief requiring reinstatement and a return to the status quo. The union filed an amended charge which raised safety issues, asserting that a reduction in staffing levels would increase the risk of injury for remaining employees.

The PERB issued a complaint limited to the issue of whether the city had committed an unfair practice in violation of the MMBA as a result of its delay in providing relevant financial information. It dismissed the charges related to the failure to meet and confer over the layoff decision or the effects of the decision. Upon appeal, the PERB upheld the partial dismissal, asserting that a decision to lay off employees was not a violation of the MMBA. The union filed a petition for writ of mandate in the superior court. The court denied the petition. The court of appeal affirmed the denial. The court held that a decision to lay off firefighters is not subject to collective bargaining.

The union relied upon the decision of the California Supreme Court in *Firefighters Union v. City of Vallejo*, 12 Cal. 3d 608 (1974). The union argued that *Vallejo* established that changes in firefighters' staffing levels that primarily involve employee workload and safety, rather than governmental policy, are mandatory subjects of collective bargaining. However, the PERB held that *Vallejo* stood for the proposition that collective bargaining applies only to the effects of a layoff, and not to the decision itself. Workload and safety concerns fall into the category of negotiable effects of a layoff decision. The court held that recharacterizing a layoff decision as one that merely impacts shift staffing levels does not transform the decision to lay off into a mandatory subject of collective bargaining.

There is an additional holding that non-final PERB decisions, including a decision upholding a refusal to issue a complaint, are subject to judicial review. The review is not under Government Code section 3509.5 but is available under *Belridge Farms v. Agricultural Labor Relations Board*, 21 Cal. App. 3d 551 (1978), in the limited circumstance where a decision is made to not issue a complaint. Although that is a non-final decision, if the decision violates a constitutional right, or if the decision exceeds a specific grant of authority, or if the decision erroneously construes an applicable statute, then judicial review is available under a petition for writ of mandamus.

MANDATORY INTEREST ARBITRATION

Amended Statute Requiring Mandatory Interest Arbitration to Solve Impasses Between Certain Public Employers and Labor Organizations Representing Law Enforcement Officers and Firefighters Is Unconstitutional

County of Sonoma v. Superior Ct. (Sonoma County Law Enforcement Ass'n), 173 Cal. App. 4th 322 (2009)

In 2003, the California Supreme Court declared that legislation which compelled mandatory interest arbitration to resolve bargaining impasses over economic issues between governmental entities and unions representing law enforcement officers and firefighters was unconstitutional. (*County of Riverside v. Superior Ct.*, 30 Cal. 4th 278 (2003)) The Supreme Court held in *Riverside* that the statute violated article XI, sections 1(b) and 11(a) of the California Constitution. The legislature then amended California Code of Civil Procedure section 1299 et seq., by providing that if the parties reached impasse, an employee organization could request referral to an interest arbitration panel. The legislation also provided that although the decision of the arbitration panel could be rejected by a unanimous decision of the governing body of the governmental agency, if there was not a unanimous decision to reject the interest arbitration decision, the decision became final and binding.

Sonoma County and the Sonoma County Law Enforcement Association reached impasse in their negotiations in 2007. The county submitted its last best and final offer, but the union's membership rejected it. Following

unsuccessful mediation, the employee organization asked to go to interest arbitration but the county refused. The county adopted its last best and final proposal, and the union petitioned the superior court to compel arbitration pursuant to California Code of Civil Procedure section 1299 et seq. The superior court granted the petition to compel, but also granted a temporary stay to permit the county to seek a writ of mandate. The county then filed a petition for a writ with the court of appeal.

The appellate court reversed the order compelling arbitration and held that the amended statutes were unconstitutional. Under article XI, section 1(b), a county board of supervisors is charged with the duty of setting employee compensation. Article XI, section 11(a) prohibits the legislature from delegating to a private body a county's power over its money or municipal functions. The first and most glaring unconstitutional aspect of the amended sections was that it required the action of a unanimous board of supervisors, whereas the governing body of a local agency operates through a majority vote, not a unanimous vote. Thus, it permitted a minority of the board of supervisors to set compensation of county employees by refusing to go along with the majority should the majority disapprove of the arbitration award.

Additionally, section 1299 et seq. was inconsistent with the board of supervisors' constitutional authority to provide for county employee compensation. According to the court, the constitution requires that the board of supervisors make the final decision on compensation of county employees. ⁴¹

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We've added news of upcoming Section events and activities and full length articles and excerpts from past issues of the Review. Additionally, there is a comprehensive set of "links" to websites that all labor and employment lawyers should have at their fingertips, including links to legal research sites, state and federal resources, and the official websites of the EEOC, NLRB, DLSE, DFEH, DOL, FCC, OSHA and many others.



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NLRA Case Notes

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respondent to show that it would have taken the adverse action even in the absence of protected activity. In this case, the administrative law judge unilaterally adopted a defense that the employer never advanced. The Board held that in cases turning on employer motivation, the administrative law judge may not provide reasons to defend an employer's decision, when those reasons have not been provided by the employer itself.

Paying Off-Duty Employees to Participate in an Election Constitutes Grounds for Overturning Election Results Unless the Employer Proves the Payment Was Reimbursement for Actual Expenses

DLC Corp., d/b/a Tea Party Concerts and/or Live Nation, 353 NLRB No. 130 (Mar. 31, 2009)

The Board found that the employer unlawfully interfered with employees' freedom of choice in an election by offering a benefit to employees in exchange for voting.

The employer promotes, stages, and presents music concerts at venues. The union sought to represent stagehands working at one of the employer's venues, and filed an election petition.

About one month prior to the scheduled election, the employer sent a letter to all employees eligible to vote in the election. The letter explained some of the procedures for the upcoming election and stated opposition to the union on several issues. The letter then stated that employees who were not scheduled to work on the days of the election would be paid for a four-hour day if they came in to vote.

Ten off-duty employees requested and received four hours of pay for voting. The union lost the election by five votes.

The union claimed that both the letter to the employees, and the actual payment to ten employees, were objectionable. The Board agreed, citing to its prior decision in *Sunrise Rehabilitation*

Hospital, 320 NLRB 212 (1995). In *Sunrise*, the Board concluded that an employer's offer of two hours of pay to off-duty employees in exchange for voting was objectionable. The Board determined that paying employees to attend an election is improper unless the payment is for the reimbursement of actual transportation expenses.

In the present case, the Board noted that, as in *Sunrise*, the employer's offer was not linked to reimbursement for travel or other costs. Moreover, the payment was substantial, and the number of employees affected was not de minimis. The Board also found an implicit anti-union message in the employer's offer to pay employees. Importantly, however, it noted that its finding of objectionable conduct did not rely upon a link between the offer and an anti-union message.

The Board accordingly rejected the hearing officer's recommendation to certify the election results and directed the Regional Director to conduct a new election.

Timing of Supervisor's Discharge Supported Finding of Employer's Unlawful Motivation

Woodbury Partners, LLC d/b/a The Inn at Fox Hollow, 353 NLRB No. 112 (Mar. 18, 2009)

The Board considered an allegation that the employer unlawfully discharged an unpopular supervisor, Alicia Arvelo, in order to induce its employees to abandon their support for the union.

The Board determined that the discharge was unlawful because the timing of the discharge created an inference that it was intended to interfere with or coerce employees in their choice of representatives. The employer failed to rebut this inference. The Board was not persuaded by the claim that Arvelo's discharge was the justifiable result of an investigation that predated the union's arrival on the scene. It was similarly not persuaded that the discharge was needed to avoid possible liability under anti-discrimination laws and that the discharge would have taken place even without the union campaign.

The record showed that the employer had known about allegations of Arvelo's abusive behavior since at least July 2006. The employer had received a letter from several employees complaining about

Arvelo's conduct on July 20, 2006, and on August 17, 2006, employees picketed outside the employer's facility, calling for Arvelo to be terminated. Nonetheless, the employer took no action on the issue until October 2006, after the union filed a petition to represent the employees. Two weeks after learning of the union campaign, the company's owner announced that he had terminated the unpopular supervisor. He told the employees: "Well, I have done something for you. I let go of Alicia Arvelo, now I want you to help me. I do not want a union here."

Under these circumstances, the Board held that the employer interfered with or coerced employees. Arvelo's discharge, coming so soon after the employer learned of the union's organizing efforts, created a strong inference of unlawful motivation. The employer attempted to rebut the inference of unlawful conduct by presenting evidence that the general manager began an investigation into the employees' allegations immediately after receiving their letter complaining about Arvelo on July 20, 2006. The Board noted, however, that after initiating the investigation, the employer practically abandoned it for nearly three months, and picked the issue up again only after it learned of the union's organizing campaign. Because the employer could not adequately explain why it let go of Arvelo when it did, the Board concluded that it was the union's presence that caused the employer to discharge Arvelo. This conclusion was reinforced by the manner in which the discharge was announced. As the Board noted, when Scotto announced that Arvelo had been terminated, he did not mention the allegations of Arvelo's abusive conduct, nor the employer's investigation of these allegations. Instead, the message conveyed by Scotto's announcement was that the employer had discharged Arvelo in order to dissuade employees from supporting the union. ⁴²

* * *

* The author wishes to thank Sanam Mahloudji for her contributions to these notes.

ENDNOTES

1. 29 USC §§ 201–219.



Karen V. Clopton is the Chief Administrative Law Judge for the California Public Utilities Commission. She has practiced labor and employment law since 1983, including her tenure with the National Labor Relations Board, private practice on behalf of management, seven years as a San Francisco Civil Service Commissioner, and her gubernatorial appointment as General Counsel for the Department of Corporations.

Message From the Chair

By Karen Valentia Clopton

The year 2009 thus far has been a Dickensian best of times and worst of times, with historic celebrations, including the election of President Obama, and historic national economic tumult. In the face of dire economic indicators, such as an unemployment rate in California over 10 percent, massive layoffs in many industries, including law firms, and the housing crisis, what role should labor and employment law practitioners serve? I believe there are several opportunities for expanding our practice area and providing advice and counsel from all perspectives.

The California Fair Employment and Housing Act (FEHA) turned 50 this year, and as we commemorate this milestone, we are also examining the impact of the deepening recession on our practice area. There are many concerns facing both employees and employers when businesses and employees experience financial troubles, including bankruptcy, wage garnishment, tax liens, work force reduction reporting rules and protocols, discrimination in layoffs, union seniority and other collective bargaining issues, benefit continuation, retirement plan issues, and the list continues. The reduced workplace is also plagued by diminished employee morale as a result of increased workloads, stress, and worry. Employees are more susceptible to workplace injuries and altercations, with longer hours, less relief, and perceived weaknesses in the business.

Labor and employment lawyers are especially important advisors during these times to minimize liability, protect worker benefits, and assist businesses in remaining open for business. While training and other preventive assistance might be viewed as a luxury during these tight budget times, a strong argument can be made that advice prior to a layoff is significantly less expensive than counsel after mistakes have been made.

The common wisdom is that during an economic downturn there is a concomitant upswing in discrimination, wrongful termination, and workers' compensation claims. On a national level, the statistics of the federal Equal Employment Opportunity Commission (EEOC) for 2008 appear to confirm that belief:

- More people experienced workplace discrimination last year than ever before, according to new data from the EEOC. And while all major categories increased, age and retaliation claims jumped the most.

- According to the new EEOC data, 95,402 job-bias claims were filed last year, up 15 percent from the previous year. Charges of age discrimination jumped by 28.7 percent, with 24,582 claims. Retaliation was the second most-frequent complaint, up 22.6 percent from the previous year.

- According to EEOC Acting Chairman Stuart Ishimaru, "The EEOC has not seen an increase of this magnitude in charges filed for many years. While we do not know if this signifies a trend, it is clear that employment discrimination remains a persistent problem."

- Although in 2008, age discrimination and retaliation topped the list for most charges filed, the previous year, the EEOC saw a 40 percent jump in pregnancy discrimination suits.

- In 2008, the EEOC filed 290 lawsuits and resolved 81,081 private sector charges. Allegations of race discrimination remain the most frequently filed, accounting for 33,937, representing 36 percent of all filings last year. This was up 11 percent from 2007.

While we cannot discern the merit of claims or the motivation behind all of them, two things are clear from the EEOC's report: Activity is on the increase, and opportunities abound for labor and employment law practitioners. In this issue of the Review, we address some of the economic implications of the FEHA as we continue to highlight the Act and its many ramifications for our practice and our lives as Californians.

In addition to the fair employment side of the FEHA, the fair housing side of the Act should be considered by our members. With our expertise in the discrimination-in-employment aspect of the FEHA, it would be a natural crossover to include discrimination in housing and lending. The credit, mortgage, and foreclosure crises in California also have shone a light on discriminatory and predatory practices in the housing and financial arenas, and our expertise is invaluable in assisting clients with these issues.

Over the years, the employment side of the FEHA has seen a tremendous growth in both the development of case law and legal practice. Too numerous to cite here, there are well over 500 published FEHA employment decisions that cover nearly every facet of the law. However, from 1997 to 2008, even the Fair Employment and Housing Commission issued

only four precedential housing decisions. Not a single FEHA fair housing decision has been decided by the U.S. Supreme Court. Likewise, the Ninth Circuit Court of Appeals has issued only a handful of FEHA fair housing decisions, but only in connection with the federal Fair Housing Act.

Our employment practice also benefits from a strong connection with bar associations. The State Bar Labor and Employment Law Section boasts over 6,000 members. Indeed, labor and employment law sections are now common in nearly all local bar associations. These groups provide a forum for developing employment law under the FEHA, support a collegial network for sharing resources, foster better client representation, sharpen lawyering skills, allow adversaries to work together for the betterment of the practice, and create opportunities to advance and refine the law.

Until recently, there had been no fair housing presence at any California bar association. Although the State Bar sponsors a large Real Property Law Section with nearly 7,000 members, fair housing has never been part of its traditional practice, and labor and employment law practitioners have not ventured out into this realm. As a result of having so few private attorneys in the fair housing practice, landlords, realtors, lenders and other potential respondents can unknowingly violate the FEHA without proper advice of counsel. Without a good body of decisions for guidance, these mistakes tend to be repeated and can be costly. The ultimate effect of this scenario is the deprivation of civil rights for tenants, protracted litigation for all parties, expensive settlements or judgments, and delayed relief.

To rectify the missing link between the Bar and fair housing, a new Fair Housing and Public Accommodations Subsection has been launched under the State Bar Real Property Law Section. Its purpose is to advance the FEHA and Unruh Civil Rights Act in housing and public accommodations. Composed of a balanced group of attorneys representing plaintiffs, landlords, and neutrals, similar to the organization of our section, the subsection will support the growth of attorneys litigating such cases. Creation of the subsection is timely in light of the fiftieth anniversary of the FEHA this year and has been led by Phyllis Cheng, the Director of the Fair Employment and Housing Department, who contributed the above information regarding the need for this practice area development. (It is excerpted in part from her February 23, 2009 article in the Los Angeles Daily Journal.) ^{4B}

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Labor and Employment Law Section**

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