Labor and Employment Litigation Update

Thursday, Oct. 17, 2024

Elizabeth Tom Arce, Partner, Liebert Cassidy Whitmore
Jennifer Rosner, Partner, Liebert Cassidy Whitmore

LCW LIEBERT CASSIDY WHITMORE

Labor and Employment Litigation Update

Elizabeth Tom Arce
LIEBERT CASSIDY WHITMORE
6033 West Century Blvd., Fifth Floor
Los Angeles, CA 90045
Telephone: (310) 981-2000
Facsimile: (310) 337-0837

Jennifer M. Rosner
LIEBERT CASSIDY WHITMORE
6033 West Century Blvd., Fifth Floor
Los Angeles, CA 90045
Telephone: (310) 981-2000
Facsimile: (310) 337-0837

Labor and Employment Litigation Update Fall 2024

Elizabeth Tom Arce, Partner & Jennifer M. Rosner, Partner
Liebert Cassidy Whitmore

I. INTRODUCTION

In the last six months, California and Federal appellate courts, as well as the Public Employment Relations Board, decided cases that will significantly impact labor and employment law. Though there have been many important cases decided since last fall, there were several we feel are especially worthy of highlighting in this update as they are particularly impactful on employment in the public sector.

The recent case decisions discussed in this paper cover a wide range of employment issues that public agencies commonly face. Amongst these decisions we saw several cases brought by employees alleging State wage violations under the Labor Code and Fair Employment and Housing Act ("FEHA") violations. In particular, the California Supreme Court provided guidance on what conduct constitutes severe and pervasive racial discrimination and when an employer's remedial efforts fall short, triggering liability. In another opinion, the Court clarified the applicability of the Labor Code wage provisions and the Private Attorney's General Act to public agencies. The United States Supreme Court clarified the standard for harm an employee must demonstrate to prevail on a discrimination claim. We also saw cases from the Ninth Circuit and the Court of Appeal concerning numerous topics relevant to public agencies and employers related to the Fair Labor Standards Act and a case concerning the California Public Records Act.

The next section includes cases with key developments in labor and employment law. We broke down these cases into six categories: (1) State wage laws under the Labor Code; (2) Discrimination, Retaliation and Harassment; (3) Due Process; (4) Fair Labor Standards Act; (5) California Public Records Act, and (6) Labor Law.

II. CASES AND LEGISLATION

Chapter 1: Labor Code and Wage and Hour

Stone v. Alameda Health System*, ___ Cal.___ ___ (2024) – *California Supreme Court Clarifies the Labor Code and PAGA's applicability to Public Employers

In *Stone v. Alameda Health System*, the California Supreme Court held State meal and rest break laws do not apply to public agencies. The Court also found that Labor Code penalties under the California Private Attorneys General Act do not apply to public agencies. Finally, the Court's ruling clarified that the definition of "municipal corporation" in Labor Code 220(b) includes all public employers.

Alameda Health Systems ("AHS") is a public agency established by the County of Alameda to provide health services to the people of Alameda County. AHS was established under California Health and Safety Code Section 101850, as a "hospital authority" – a government entity separate and apart from the County.

In March 2021, AHS employees Tamelin Stone and Amanda Kunwar brought a class and PAGA representative action against AHS in superior court asserting violations of the California Labor Code on behalf of themselves and others for (1) failure to provide off-duty meal periods, (2) failure to provide off-duty rest periods, (3) failure to keep accurate payroll records, (4) failure to provide accurate itemized wage statements, (5) failure to pay wages, (6) failure to timely pay wages, and (7) civil penalties under PAGA.

In the trial court, AHS moved to dismiss the plaintiffs' complaint, arguing that AHS was exempt from plaintiffs' state law wage and hour claims due to its status as a public agency. AHS relied on the holding established in *Johnson v. Arvin-Edison Water Storage District* (2009) 174 Cal.App.4th 729, 736, that absent express words to the contrary, public agencies are excluded from coverage under the Labor Code's provisions. The trial court agreed with AHS and dismissed the complaint's wage and hour claims, concluding that as a public agency, AHS was not subject to the state law wage and hour claims pled in plaintiffs' action. The court also dismissed the PAGA claim. It reasoned that public entities like AHS are not "person[s]" subject to PAGA penalties pursuant to Labor Code section 18 and that the PAGA claim here derived from Labor Code violations that are not applicable to public entities. AHS also argued that PAGA damages are akin to punitive damages, which cannot be awarded against public agencies. The trial court agreed, and Plaintiffs appealed the decision to the Court of Appeal.

In a February 2023, the Court of Appeal reversed most of the trial court's decision, thus permitting most of plaintiffs' claims to go forward. As to plaintiffs' meal/rest break and recordkeeping claims, the Court of Appeal concluded that application of California's meal/rest break and recordkeeping laws did not infringe on any sovereign power of AHS, and thus the claims could proceed. As to plaintiffs' claims that it did not receive prompt payment, the Court of Appeal allowed them to go forward because it held that AHS was not a "municipal corporation" under Labor Code 220(b), and thus that section's exclusion did not apply. The Court of Appeal also allowed plaintiffs' PAGA claim to proceed holding that these damages were not analogous to punitive damages (which cannot be awarded against public agencies). The Court of Appeal sustained the dismissal of plaintiffs' wage statement claims. AHS filed a petition for review of the Court of Appeal decision to the California Supreme Court, which granted review of the decision in May 2023.

On August 15, 2024, the California Supreme Court reversed the Court of Appeal's decision, holding that plaintiffs' meal/rest break, PAGA, and other Labor Code claims were inapplicable to AHS and other public agencies. The Court first clarified that California meal and rest break laws do not apply to public agencies, unless they specifically state they apply to public agencies, because the statutory language, context and history show that the legislature intended to exclude public employers from those obligations.

Labor Code sections 226.7 and 512 address the requirements for California employers to provide meal and rest breaks. Specifically, the Labor Code imposes meal and rest break obligations on "employers," and an "employer" must be a "person" as defined in Section 18 of the Labor Code. Based on this definition, the Court concluded that a public agency is not a "person" subject to the aforementioned meal and rest break requirements. The Court reasoned that if the legislature intended meal and rest break laws to apply to government employers, it would have expressly stated so in the statute, as it has for other provisions that apply to public agencies.

The Court also rejected the Court of Appeal's exclusion of AHS from the Wage Orders' public agency exclusion. The Court found that the legislature intended the definition of "political subdivision" in the Wage Orders to be broad, and as a public agency, AHS is included within that definition.

The Court then examined the applicability of PAGA to public agencies. PAGA allows an employee to pursue "defined penalties" (penalties set forth in specific Labor Code provisions) and "default penalties" (for each iteration of a violation) against an employer on behalf of themselves and employees so aggrieved, for Labor Code violations. However, like the meal and rest break laws, the PAGA statute defines employer as a "person" under Labor Code section 18. Following its reasoning above, the Court concluded that public employers are not subject to PAGA and as such, public employers cannot be liable for penalties under PAGA. The Court also cited to legislative history and public policy, writing that PAGA penalties are akin to punitive damages and that the "potentially quite large" costs public entities could incur if subject to PAGA suits – including prevailing plaintiff's attorney fees – would be an unjustified "drain on public funds."

Finally, the Court clarified that Labor Code Section 220(b) exempts local government employers from the requirements of some wage payment laws. Section 220(b) states: "Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation." The Court of Appeal held that AHS was not a municipal corporation and thus Labor Code 220(b) did not exempt AHS from those sections. However, the California Supreme Court rejected the Court of Appeal's reasoning, holding that section 220(b) should be read broadly to encompass all government employers (except the State, which is covered by section 220(a), including AHS, within the definition of a "municipal corporation."

Stone is a significant victory for public employers. Not only does it provide much needed clarity on the applicability of State meal and rest breaks laws to public agencies, this decision reinforces the principle that public entities are not subject to Labor Code provisions unless they expressly state so. Public employers are also not subject to liability for civil penalties imposed by PAGA cases.

Chapter 2: Discrimination, Retaliation and Harassment

Muldrow v. City of St. Louis*, 144 S. Ct. 967 (2024) – *US Supreme Court Says Employee Need Only Show Some "Disadvantageous" Change to Support Discrimination In Job Transfer

Sgt. Muldrow worked as a plainclothes officer in the St. Louis Police Department's specialized Intelligence Division for nearly 10 years. She investigated public corruption and human trafficking cases, and oversaw the Gang Unit and Gun Crimes Unit. By virtue of her position, Sgt. Muldrow was also deputized as a Task Force Officer with the FBI, had FBI credentials, an unmarked take-home vehicle, and the authority to pursue investigations outside of St. Louis.

Sgt. Muldrow's job performance was exceptional. In 2017, the outgoing commander of the Intelligence Division referred to her as a "workhorse" and considered her his most reliable sergeant. But the new Intelligence Division commander told the Department that he wanted to replace Sgt. Muldrow with a male officer. The new commander – who often referred to Sgt. Muldrow as "Mrs." rather than "Sergeant" – testified that a male officer seemed like a better fit for the Division's dangerous work.

The Department approved the transfer of Sgt. Muldrow to a uniformed position. While her rank and pay remained the same, her responsibilities, perks, schedule, and wardrobe choices changed. Sgt. Muldrow no longer worked with high-ranking officials on priority matters in the Intelligence Division. Instead, she supervised the day-to-day activities of neighborhood patrol officers and handled various administrative matters. Sgt. Muldrow lost her FBI status and vehicle, and her work week went from Monday-through-Friday to a rotating schedule that included weekend shifts.

Sgt. Muldrow sued the city under Title VII to challenge the transfer. The District Court granted the city's request for summary judgment and held that Sgt. Muldrow needed to show that her transfer effected a "significant" change in working conditions and resulted in a "material employment disadvantage" - a heighted standard that Sgt. Muldrow could not meet. Sgt. Muldrow appealed, and the U.S. Court of Appeals for the Eighth Circuit affirmed. The U.S. Supreme Court granted certiorari.

In a unanimous decision, the Court held that an employee who is challenging a job transfer under Title VII need not show that the allegedly discriminatory transfer resulted in a significant employment disadvantage. Rather, an employee need only show that the transfer brought some harm with respect to an identifiable term or condition of employment.

Not only did the Court's decision overturn the Eighth's Circuit ruling, the decision also overturned precedent in other circuits requiring employees challenging a transfer under Title VII to satisfy a heightened threshold of harm requirement described as "significant," "serious," "materially adverse," or similar terms. As the Court explained, to demand "significance" where the law does not require it adds requirements that Congress did not enact. The law only requires that employees show an allegedly discriminatory transfer brought about some "disadvantageous" change in employment terms or conditions.

Sgt. Muldrow's transfer was a significant change in assignment for a long-time, respected police sergeant. The Court found that Sgt. Muldrow's allegations, if proven true, "left her worse off several times over," and noted that it did not matter that her rank and pay remained the same or that she could still advance to other jobs. Title VII prohibits making a transfer based on sex with the consequences Sgt. Muldrow described.

Muldrow is important to employers as it lowers the threshold of harm that an employee must demonstrate under Title VII with respect to an alleged discriminatory transfer. This case demonstrates that a plaintiff must only show that the alleged discriminatory transfer disadvantaged the plaintiff and overturned prior circuit court decisions that required that a plaintiff demonstrate that the transfer caused significant or materially adverse harm.

Twanda Bailey v. San Francisco District Attorney's Office*, 16 Cal.5th 611 (2024) – *A Coworkers Use of a Single Racial Epithet May Suffice to Establish a Claim of Harassment

In *Twanda Bailey v. San Francisco District Attorney's Office*, the California Supreme Court held that that an isolated act of harassment may be actionable if it is sufficiently severe in light of the totality of the circumstances, and that a coworker's use of an unambiguous racial epithet may be found to suffice. The Court also found that a course of conduct that effectively seeks to withdraw an employee's means of reporting and addressing racial harassment in the workplace is actionable in a claim of retaliation, and such conduct may constitute an adverse employment action.

In 2001, Twanda Bailey began working at the San Francisco District Attorney's Office as a clerk in the records department. The office promoted her in 2011 to an investigative assistant position. Bailey worked alongside Saras Larkin, another investigative assistant. The two sat next to each other in the records room. Bailey is African American. Larkin is Fijian/East Indian. On January 22, 2015, while in the records room, Larkin told Bailey that she saw a mouse run under Bailey's desk, which startled Bailey who jumped out of her chair. After this, Larkin quietly commented to Bailey about her being startled, using a racial slur in reference to Bailey.

Immediately following this incident, Bailey left her office and told three coworkers what Larkin had said. Bailey was crying and upset. Although Bailey was offended by Larkin's use of the racial slur, she did not immediately complain to human resources because she feared harassment and retaliation. This fear was based on Bailey's understanding that other employees had been harassed and discriminated against following incidents with Larkin. Bailey understood that Larkin was best friends with the office's department personnel officer, Evette Taylor-Monachino, and that Larkin's actions against other African American women caused them to be reassigned or separated from the District Attorney's Office.

On January 23, Bailey's supervisor, Alexandra Lopes, overheard a conversation about the incident between Bailey and Larkin. Lopes told Bailey that she planned to notify HR and on January 28, Lopes reported the incident to Sheila Arcelona, the assistant chief of finance and administration. Arcelona conferred with Taylor-Monachino and Eugene Clendinen, the chief administrative and financial officer, who reported directly to the district attorney. They agreed Arcelona should meet with Bailey and Larkin separately, and that Taylor-Monachino, as the department personnel officer, should attend the meetings.

Arcelona and Taylor-Monachino met with Bailey, who reiterated that Larkin had used an offensive racial slur and confirmed that this was the only time she had heard Larkin use such language. Arcelona and Taylor-Monachino then met with Larkin, who "did not admit to making the alleged remark." Arcelona counseled Larkin on the city's "Harassment-Free Workplace Policy" and informed her that use of the alleged language was "unacceptable." Although Taylor-Monachino was the HR representative charged with reporting incidents of workplace harassment to the city's Department of Human Resources, she did not file a formal complaint as city policy required.

On March 23, Bailey asked Taylor-Monachino for a copy of the complaint regarding the January 22 incident. Taylor-Monachino informed Bailey that no complaint existed. When Bailey requested that a complaint be filed, Taylor-Monachino refused. Taylor-Monachino stated that Bailey should not have told her coworkers about the incident with Larkin, adding that, by doing so, Bailey could cause a hostile work environment for Larkin.

After the March 23 meeting, Bailey noticed a shift in Taylor-Monachino's behavior toward her, including ignoring, laughing at, and making rude comments, such as mocking Bailey's workers' compensation claim. Bailey testified that this conduct was ongoing and occurred daily, although she did not believe it was racially motivated. However, it was acknowledged that Taylor-Monachino's actions were in retaliation for Bailey's complaint against Larkin. In April, DHR received a report regarding Bailey's allegations against Larkin, and in May, Bailey formally reported that Larkin harassed her based on race. She also claimed that Taylor-Monachino retaliated against her after the March 23 incident.

Bailey's performance review in July rated her as "Met Expectations," similar to previous years. However, the review noted areas for improvement in attendance and responsiveness to supervisors. Bailey disagreed with this assessment, stating that her absences and challenges in performing her duties stemmed from the stress caused by her interactions with Larkin and fear of being accused of creating a hostile work environment. Bailey's stress, exacerbated by Taylor-Monachino's behavior, led her to avoid walking near her office. In July, DHR informed Bailey that her complaints did not meet the threshold for harassment or retaliation, and the department would not investigate further.

In August, Bailey reported that she was threatened by Taylor-Monachino while waiting in her car outside the office. Bailey reported that Taylor-Monachino pulled up alongside Bailey, rolled down her window, and gestured in a manner Bailey perceived as threatening. Although Bailey could not hear the words spoken, she claimed she saw Taylor-Monachino saying "you are going to get it." Bailey reported the incident immediately. Bailey felt increasingly intimidated by Taylor-Monachino's behavior, which included ignoring her, chuckling in her presence, and making dismissive comments about her workers' compensation claim. Bailey formally reported feeling threatened for the first time to Clendinen on August 12. Later that month, Bailey's psychiatrist confirmed treatment for severe anxiety and depression due to workplace stress. DHR investigated Bailey's allegations against Taylor-Monachino but found the evidence inconclusive, though Taylor-Monachino was disciplined for a separate incident.

In December, Bailey filed a lawsuit against the City, claiming racial discrimination, harassment, and retaliation. The trial court determined that the only race-related incident was Larkin's single use of a racial slur, which it ruled did not constitute severe or pervasive racial harassment. The trial court held that Bailey's performance review and the alleged mistreatment by Taylor-Monachino were also not sufficient to prove adverse employment actions, as social ostracism was not enough to rise to the level of a materially adverse action. As a result, Bailey's claims were dismissed, and the trial court ruled in favor of the City. In an unpublished opinion, the Court of Appeal affirmed the trial court's grant of summary judgment and the California Supreme Court granted review.

The City argued to the Supreme Court that a single racial slur used by a coworker, over a 14-year period, did not meet the standard of severe or pervasive harassment. The Court, however, disagreed. The Court stated that the severity of the harassing conduct should be assessed from the perspective of a reasonable person in the plaintiff's position. The Court indicated that in some cases, racially motivated actions or comments may appear more offensive to a certain targeted group.

The Court noted that case law has consistently shown that isolated incidents, especially those involving racial epithets, can be severe enough to create a hostile work environment depending on the totality of the circumstances. Federal courts, as well as FEHA, recognize that the slur used here carried a history of racial violence and subjugation, making it far more than a mere offensive utterance. Those courts have ruled that even one-time use of such slurs by supervisors or coworkers can be sufficient to establish a hostile work environment, especially when they are deeply humiliating and degrading.

While the Court of Appeal placed weight on the fact that the racial slur was used by a coworker, not a supervisor, the totality of the circumstances must be considered. A coworker's influence or the nature of workplace relationships can still create an abusive environment, even without direct managerial authority. In this case, the single use of the slur by Larkin, coupled with its specific direction at Bailey, raised a triable issue about whether this isolated incident was severe enough to alter the work environment. The Court highlighted the importance of evaluating the context and impact of offensive language, especially when racial slurs are involved.

The Court also considered whether the City could be held liable for the harassment Bailey experienced, given that a genuine issue of material fact was raised regarding the severity of the conduct. If a supervisor is involved in the harassment, the employer is strictly liable. However, if the harasser is a nonsupervisory employee, the employer's liability hinges on whether it took immediate and appropriate corrective action upon knowing about the harassment. The Court found that a significant dispute arose over whether the City took "immediate and appropriate corrective action" and whether Taylor-Monachino's actions undermined the City's efforts to take remedial action on the reported harassment.

Turning to Bailey's retaliation complaint, the City argued, and the lower courts agreed, that Taylor-Monachino's conduct and comments in Bailey's June 2015 performance review did not constitute an adverse employment action. However, Bailey argued that the lower court failed to consider the broader context and the cumulative effect of the conduct. The Supreme Court agreed with Bailey, noting that the totality of the circumstances must be considered when assessing whether an adverse action occurred, and remanded the case for further evaluation.

This case establishes that even an isolated act of harassment in the workplace can be actionable and is a critical reminder to employers to have policies in place to comply with FEHA and all applicable anti-harassment laws. Employers must also be vigilant in discouraging employees from engaging in any conduct that could be perceived as harassment, and investigate all discrimination, retaliation and harassment complaints.

Paleny v. Fireplace Products U.S., Inc.*, 103 Cal.App.5th 199 (2024) – *No Discrimination for Employee Undergoing Egg Retrieval Under FEHA

Paleny began working for Fireplace Products as a full-time administrative assistant in May 2018. In October 2018, she informed her employer that she was undergoing egg retrieval procedures. This process continued through her termination in February 2019. In November 2018, the appellant's supervisor, Salah, expressed disapproval of these procedures. The appellant claimed that this led to workplace harassment, particularly in relation to needing time off for medical appointments. The tension reportedly escalated when Paleny disagreed with Salah's negative stance on the procedures.

In February 2019, Paleny notified Salah that she needed additional time off for another appointment related to her egg retrieval process. According to Paleny, Salah became angry, and Fireplace Products terminated her employment shortly thereafter. Paleny's complaint included ten causes of action, mainly alleging violations under the California Fair Employment and Housing Act (FEHA), including claims of harassment, discrimination, and retaliation based on sex (pregnancy), as well as wrongful termination.

Fireplace Products moved for summary judgment, arguing that Paleny did not have a protected characteristic under the FEHA because she was neither pregnant, attempting to become pregnant, nor disabled during her employment. They pointed out that Paleny's egg donation and freezing procedures were elective and unrelated to an immediate pregnancy or disability. The employer also noted that Paleny did not request accommodations, sick time, or leave related to a pregnancy or disability during her employment.

The trial court ultimately ruled in favor of the employer, granting their motion for summary judgment. The court concluded that the procedures Paleny underwent were not covered under the FEHA as pregnancy-related medical conditions. Paleny's decision to freeze her eggs for potential future use was deemed too indirect to establish a claim for pregnancy discrimination or harassment. Additionally, the trial court found that Paleny could not establish that she was disabled or engaged in protected activity under the FEHA.

In upholding the trial court's ruling, the Court of Appeal held that section 12945 of the FEHA necessitates proving a disability from pregnancy or a related condition or requesting accommodations for such a condition, but since Paleny was not pregnant and had no related disability, she failed to meet this criteria for her claims. The Court found that Paleny was not pregnant, disabled by pregnancy or suffering from a medical condition related to pregnancy. For those reasons, the Court held that her FEHA claims failed.

While *Paleny* demonstrates some limitations on protections for employees under FEHA, it is possible that if this case was filed after SB 523 took effect, the outcome could have been different. In 2022, the California Legislature passed Senate Bill ("SB") 523. SB 523 expanded the FEHA to include "reproductive health decision-making" in the list of classifications protected by the FEHA. Reproductive health decision-making means, without limitation, "a decision to use or access a particular drug, device, product, or medical service for reproductive health."

Ververka v. Department of Veterans Affairs*, 102 Cal.App.5th 162 (2024) – *FEHA Mixed-Motive Standard Does Not Apply to Whistleblower Retaliation Cases

Donald Ververka worked for the California Department of Veterans Affairs ("CalVet") as the administrator of the veterans' home in Yountville, CA. Ververka sued his employer for violation of Labor Code section 1102.5, allegedly for terminating him in retaliation for his reporting of health and safety issues about the home to an independent state agency and to his supervisor. Days after Ververka reported his safety concerns, his supervisor recommended Ververka's removal due to poor management of the home.

At trial, the jury found that Ververka's disclosures constituted protected activity and that his protected activity was a contributing factor in his termination under Labor Code section 1102.5. However, the jury still found in favor of CalVet because CalVet had proven by clear and convincing evidence that it would have made the same decision for "legitimate, independent reasons" as specified in Labor Code section 1102.6.

At the California Court of Appeal, Ververka argued that because the jury found his protected activities were a contributing factor in his termination, he was entitled to declaratory relief, injunctive relief, and reasonable attorney's fees and costs based on the California Supreme Court's opinion in *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203. In *Harris*, the California Supreme Court held that proof that an adverse employment decision was substantially motivated by discrimination may be grounds for a *judicial declaration* of employer wrongdoing, *injunctive relief* to stop discriminatory practices, and *reasonable attorney's fees and costs* for litigation for which the employer's own wrongdoing has been shown to be substantially responsible. However, *Harris* also held employees are not entitled to *damages* and *back pay* under the FEHA if the employer proves it would have made the same decision for non-discriminatory reasons.

The Court of Appeal disagreed with Ververka. The Court concluded that the analysis in *Harris, supra,* was specific to the language in the FEHA and did not extend to Labor Code section 1102.5 whistleblower claims, which must be evaluated under the standard described in section 1102.6.

In January 2022, the California Supreme Court held that Labor Code section 1102.6, not the *McDonnell-Douglas* burden-shifting test, is the proper framework for litigating section 1102.5 whistleblower claims, reasoning that section 1102.6 describes the standards and burdens of proof for both parties in a section 1102.5 retaliation case. (*Lawson v. PPG Architectural Finishes, Inc.,* (2022) 12 Cal.5th 703.) *Ververka* also shows the continued trend by courts to distinguish the legal standard applicable to section 1102.5 claims and is a reminder that defenses applicable to FEHA claims may not apply to whistleblower retaliation claims.

Meyer Kama v. Alejandro N. Mayorkas*, 107 F.4th 1054 (9th Cir. 2024) – *56-Day Gap Between EEO Complaint and Termination Did Not Establish Retaliation

Meyer Kama sued the administrator of his former employer, the Transportation Security Administration ("TSA"), alleging Title VII retaliation. The TSA terminated Kama's employment based on his failure to cooperate in an investigation into whether he received illegal compensation for assisting other employees during internal agency investigations.

Kama did not dispute that the TSA's reason for terminating him was a legitimate and non-retaliatory reason, but instead claimed that the reason was merely pretext to cover up unlawful retaliation. To establish this claim, Kama relied primarily on the temporal proximity between the date of his last formal EEO complaint and the date of his termination. Kama argued that the 56-day interval established illegal pretext by proximity alone. He also cited other circumstantial evidence to support his pretext claim. The District Court disagreed and granted TSA's motion for summary adjudication. Kama appealed.

The Ninth Circuit Court of Appeals affirmed the District Court's decision and held that the temporal proximity between Kama's last formal EEO complaint and the date of his termination was not sufficient, by itself, to support his claim. The 56-day period was considerably longer than the time periods in nearly all of the cases that Kama relied upon. Also undermining Kama's temporal proximity argument was the fact that there was a strong temporal link between his noncooperation and his termination. The Court also rejected Kama's list of circumstantial evidence.

This case is a reminder that the temporal proximity between an employee's protected conduct and an employer's alleged retaliatory conduct is like other types of circumstantial evidence. If it is particularly strong, it can establish pretext on its own; otherwise, more evidence is required.

Lindsay Okonowsky v. Merrick B. Garland*, 109 F.4th 1166 (9th Cir. 2024) – *Courts Must Look at Conduct Occurring Outside of the Physical Work Environment, Including Social Media, as Part of a Hostile Work Environment Claim if an Employee Can Show an Effect on the Workplace

Lindsay Okonowsky, a psychologist, worked in the Special Housing Unit ("SHU") of the Federal Correctional Complex Lompoc in California. Steven Hellman, a corrections Lieutenant, supervised custody staff in the SHU. Hellman was not Okonowsky's direct supervisor. Hellman was responsible for the safety of inmates and staff, including staff members like Okonowsky. Around January 2020, Hellman and Okonowsky had apparent disagreements and Hellman believed that Okonowsky made it "impossible" for him and other corrections officers "to do their job" in the SHU.

During this time, on January 6, 2020, Hellman created an Instagram page titled "8_and_hitthe_gate." The page did not name or identify its creator. The page contained hundreds of posts, many of which were overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes that explicitly or impliedly referred to the Bureau of Prisons, Lompoc staff, and Lompoc inmates. The page was followed by more than one hundred Lompoc employees, including the Human Resources Manager, the Union President, and a member of the prison's Special Investigative Services.

Posts or comments on Hellman's page referred to interactions between the SHU custody team, the SHU psychologist, and/or SHU inmates or inmates, strongly suggesting that the person who ran the page worked in the SHU. Some of the posts displayed or suggested violence against and/or sexual contacts with female co-workers, or violence against women generally, were suggestive of rape and physical harassment, and depicted scenes of violence against women in general, but also against "the SHU psychologist" specifically. Okonowsky forwarded images from the page to her supervisor, Carl Clegg and also messaged the prison's Acting Safety Manager, Robert Grice, on Instagram to express her concern that he was following the page, "liking" posts, and commenting on posts. Manager Grice responded to her on Instagram, saying that the posts were funny, that he was "Sorry, not sorry," and that Okonowsky needed to toughen up or get a sense of humor.

Okonowsky voluntarily transferred from Lompoc's medium security facility to Lompoc's low security facility. Special Investigative Agent Victor Gonzales, who was Hellman's supervisor, opened an investigation and referred the matter to the Bureau's Office of Internal Affairs. Later that day, a post appeared on the "8_and_hitthe_gate" page threatening Okonowsky and sexually debasing her. The post also included a sexually obscene hashtag reference and it was clear that someone had alerted Lieutenant Hellman to Okonowsky's complaint.

Okonowsky no longer felt safe at work. Okonowsky sent Warden Engleman a copy of the menacing post. The Warden never responded to or contacted Okonowsky. Gonzales called Okonowsky but told her that he had reviewed the Instagram page and didn't "really see anything that's a problem".

Okonowsky felt ostracized and concerned that she could be in danger in her physical workspace. Hellman continued to post disturbing content on his Instagram page, including posts that targeted and intimidated Okonowsky for reporting Hellman to prison management. When she raised the issue of Hellman's page with Human Resources Manager Taulbee McGinnis, who was an active follower of the page, McGinnis told Okonowsky that he thought the memes were "funny." Okonowsky's productivity suffered. Okonowsky and her supervisor, Clegg, met with Associate Warden Gutierrez to discuss Hellman's conduct. Clegg expressed his concern for Okonowsky's safety and suggested that the prison convene a workplace violence Threat Assessment Team, however, Warden Engleman decided it was not warranted.

In early April 2020, two months after Okonowsky first complained of Hellman's conduct, a new warden, Barbara Von Blanckensee, arrived at Lompoc. On April 13, 2020, Warden Von Blanckensee convened a six-member Threat Assessment Team to investigate Okonowsky's complaint. The Threat Assessment Team interviewed Okonowsky and Hellman. The Threat Assessment Team issued its report and recommendation to Warden Von Blanckensee on April 16, 2020. In its report, the Threat Assessment Team concluded that numerous employees knew that Hellman was the Instagram page's owner, and found Hellman's denial that he directed any posts at Okonowsky unconvincing. The Team concluded that Hellman's conduct constituted impermissible "harassing conduct" within the Bureau of Prisons' definition and that Hellman's conduct likely violated the Bureau's standards of conduct for supervisors and law enforcement officers. The Team recommended that management take a variety of responsive actions, including maintaining the separation of Hellman and Okonowsky, and issuing a letter to Hellman from his supervisor ordering him to cease posting in violation of the Bureau's Anti-Harassment Policy and Standards of Employee Conduct.

The prison issued Hellman a cease and-desist letter stating that his posts on social media appeared to have violated the Bureau's Anti-Harassment Policy. The letter ordered Hellman to stop such conduct immediately and stated that any failure to comply with the letter would not be tolerated and could result in removal. For at least three weeks after receiving the letter, Hellman continued to make near daily posts on his Instagram page, including posts mocking the prison psychology department and the Threat Assessment Team and posts suggesting sexual relations with and/or sexually harassing behavior toward female co-workers.

Okonowsky alerted prison management to Hellman's continued conduct. The prison never responded, and Hellman's conduct continued. He made additional posts mocking the Threat Assessment Team, and made sexually overt posts targeting female co-workers. On January 24, 2021, because of the harassment she experienced at Lompoc, Okonowsky transferred to a Bureau facility in Texas.

Okonowsky filed suit in 2021, asserting a single claim under Title VII of the Civil Rights Act of 1964 for discrimination on the basis of sex. The District Court granted the Government's Motion for Summary Judgment. The District Court limited its consideration of the evidence to just five posts made on the Instagram account that, in the District Court's view targeted Okonowsky specifically and did so because of her sex. The District Court concluded that the five posts "occurred entirely outside of the workplace" because the posts were made on a staff member's personal Instagram page and none of the five posts was ever sent to Okonowsky, displayed in the workplace, shown to Okonowsky in the workplace, or discussed with Okonowsky in the workplace without her consent. Okonowsky appealed.

The Ninth Circuit disagreed. The Court explained that to determine whether Okonowsky was subjected to a sexually hostile work environment, it would look to: 1) whether Okonowsky was subjected to verbal or physical conduct of a sexual nature; 2) whether the conduct was unwelcome; and 3) whether the conduct was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Focusing on the third factor, the Court looked at the totality of the circumstances and determined that conduct that takes place outside of the physical work environment is part of the totality of the circumstances.

The Ninth Circuit rejected the government's argument that conduct occurring entirely separate from and unrelated to the workplace cannot, standing alone, suffice to preclude summary judgment in favor of the employer on a hostile work environment claim. The Court opined that the relevant standard is whether harassing conduct had an unreasonable *effect* on the *working environment* and, if so, to consider whether and how the employer responded to that effect. Thus, even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment.

Under this analysis, the Court emphasized that social media posts are permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear and that regardless of where Hellman was, Lompoc employees who followed the page were free to view, "like," comment, share, screenshot, print, and otherwise engage with or perceive his abusive posts from anywhere.

The Court also noted that conduct occurring outside of the physical work environment is part of the totality of the circumstances analysis. The Supreme Court has instructed courts to consider a non-exhaustive list of the circumstances and characteristics of alleged harassment which does not distinguish between conduct occurring on or off the physical or digital worksite.

Here, the Court found that under the circumstances, Okonowsky produced ample evidence that Hellman's sexually discriminatory conduct made it more difficult for her to do her job, to take pride in her work, and to make her want to stay in her position. The Court also found that the Bureau's lackluster response to Okonowsky's complaint "reinforced rather than remediated" Hellman's sexually harassing conduct, cementing the discriminatory effect of his behavior within the workplace. The Court found that the District Court's view was too narrow by not considering all Instagram posts and the conduct of the prison management, and therefore, the Bureau was not entitled to summary judgment. Finally, the Court found that the Bureau's remedial efforts were wholly inadequate and that a reasonable juror could conclude that the prison failed to take prompt and effective remedial action to address Okonowsky's hostile work environment.

This case demonstrates that employers must look at conduct occurring outside of the physical work environment as part of the totality of the circumstances analysis and that off duty conduct, including on personal social media accounts, can contribute to an employee's hostile work environment claim if the employee can show an effect on the workplace.

Purushothaman Rajaram v. Meta Platforms, Inc.*, 105 F.4th 1179 (2024) – *42 U.S.C. § 1981 Prohibits Discrimination Against United States Citizens in Hiring, Based on Their Status as a United States Citizen

42 U.S.C. § 1981, entitled "Statement of equal rights," provides: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The H-1B program, allows employers to hire qualified foreign workers for specialty occupations when there is a shortage of skilled workers authorized to work in the United States. Purushothaman Rajaram is a naturalized United States citizen and an information technology professional. On several occasions between 2020 and 2022, he unsuccessfully applied to work at Meta Platforms, Inc. (owners of Facebook, Instagram, and WhatsApp, among other online services) ("Meta").

Rajaram alleged that Meta refused to hire him because Meta prefers to hire noncitizens holding H-1B visas to whom it can pay lower wages. Rajaram brought a putative class action asserting a single claim: that Meta violated 42 U.S.C. § 1981 by discriminating against United States citizens in hiring. The District Court dismissed the complaint, holding that section 1981 "does not bar discrimination based on U.S. citizenship." Rajaram appealed.

The Ninth Circuit disagreed, finding that Rajaram stated a claim under section 1981. The Court noted that while the statute does not expressly provide a cause of action for those injured by violations of the nondiscrimination principle it sets out, it impliedly affords a federal remedy against discrimination in private employment. Further, while a plaintiff bringing a claim under section 1981 must initially identify an impaired 'contractual relationship' under which the plaintiff has rights," section 1981 protects the would-be contractor along with those who already have made contracts.

The Court looked to the plain language of the statute, reasoning that an employer that discriminates against United States citizens gives one class of people—noncitizens, or perhaps some subset of noncitizens—a greater right to make contracts than "white citizens." The Court opined that if some noncitizens have a greater right to make contracts than "white citizens," then it is not true that "[a]ll persons" have the "same right" to make contracts as "white citizens."

The Court rejected Meta's argument that the statute's "protections are limited to discrimination based on race or alien status, not discrimination based on U.S. citizenship." The Court reasoned that the language of section 1981 was unambiguous. The Court also noted that this case, concerned citizenship discrimination, not racial discrimination, before explaining that section 1981 combines a portion of section 1 of the Civil Rights Act of 1866 with section 16 of the Enforcement Act of 1870.

This ruling provides a basis for an applicant or employee to sue an employer for discrimination based on U.S. citizenship, which is independent and distinct from the prohibition against discrimination on the basis of race. This ruling is also a reminder for employers to make hiring and employment decisions based on legitimate business reasons.

Chapter 3: Due Process

LaMarr v. Regents of the University of California, 101 Cal.App.5th 671 (2024) – *No Right to Skelly After Employee Voluntarily Accepted A Demotion In Lieu of Termination*

June LaMarr was a medical office services coordinator ("Coordinator") level V at the University of California Davis Medical Center (University). In 2014, LaMarr's supervisor, Walter Knowles, suspended her for three days for performance issues. When the performance issues persisted, Knowles prepared, but did not issue, a "Letter of Intent to Dismiss" ("Letter"). Knowles' supervisor, Chris Jackson believed that the dismissal was unusually expedited. In addition, LaMarr had told Jackson that she was having difficulty with Knowles. To diffuse the situation, Jackson sought to transfer LaMarr.

Jackson was unable to find a coordinator level V position in any other departments, so Jackson offered LaMarr a Coordinator level III position in a different department on a "temporary" basis at her normal level V salary. LaMarr was not yet aware of the Letter Knowles had prepared, but had not issued. LaMarr and Jackson moved forward with the temporary transfer in September 2014.

LaMarr later confirmed to Jackson that her new supervisor was pleased with LaMarr's performance and was comfortable making the role permanent. Jackson told LaMarr that the University was unable to keep LaMarr's level V salary permanently. Jackson gave LaMarr the following three options, and in doing so informed LaMarr of the Letter Knowles had prepared: 1) Stay in her new position at a level III salary; 2) Return to her former position at a level III salary; or 3) Return to her former position and salary, where she would be issued the Letter and dismissed. LaMarr was surprised to learn about the Letter. She responded that she "would love" to return to her former job, but she could not return to a hostile environment where every decision she made could be questioned or grounds for her dismissal. LaMarr chose to remain in her new position at the lower salary in consideration of her health and stress. LaMarr felt that she was forced to accept the lower pay. She felt her only two choices were to be "demoted or fired." But, LaMarr admitted that if she had chosen to return at her former salary and the University had dismissed her, she would have had a right to a *Skelly* conference.

LaMarr sued the University. The trial court framed the issue as: Whether LaMarr was deprived of due process on March 10, 2015, when, without offering her a pre-deprivation *Skelly* hearing, her employer proposed to either transfer her to a non-supervisory position with reduced pay or return her to her higher paying supervisory position and face termination proceedings.

The trial court decided in favor of the University. First, the University had never actually issued the Letter to LaMarr, and thus, no *Skelly* rights had been triggered. Second, although LaMarr undoubtedly felt she was under duress, there was no legal authority supporting the proposition that feelings of duress trigger due process protections, such as those under *Skelly*. LaMarr appealed.

The Court of Appeal affirmed. The Court reasoned that the unissued Letter did not trigger LaMarr's *Skelly* rights and that her transfer was voluntary. While the transfer was a demotion (which would trigger *Skelly* rights), *Skelly* was not required because LaMarr voluntarily agreed to the demotion. Though taking the demotion was a difficult choice for LaMarr, the Court decided that a difficult choice is not the same as an involuntary choice.

LaMarr also argued that she was owed *Skelly* before having to choose between the demotion and the dismissal. The Court said LaMarr misunderstood the *Skelly* requirement. The Court found that the University could not violate LaMarr's due process until it took an adverse employment action without providing the *Skelly* safeguards. It was LaMarr's prerogative to either risk termination and receive a *Skelly* hearing, or voluntarily accept the transfer and not have a *Skelly* hearing. Under the facts of this case, the law did not allow her to have both.

This case demonstrates the importance of timing and having clear, documented communications when an employee voluntarily accepts a demotion in lieu of termination. Had the University issued the Letter of Intent to Dismiss before it gave LaMarr the option to demote, the outcome of this case would likely have been different.

Chapter 4: Fair Labor Standards Act

Cariene Cadena v. Customer Connexx LLC, **107 F.4th 902 (2024)** *– Time Spent Booting Up and Shutting Down Computers May be Compensable Under the FLSA*

Customer Connexx ("Connexx") operates a customer service call center in Las Vegas, Nevada. Connexx employees worked as call center customer service agents who supervised and monitored the calls of the call center and quality assurance agents. The employees were required to use timekeeping software to clock in and out for each shift.

Connexx instructed its workers to clock in before opening any other computer program necessary to perform their call center roles, and its policies prohibited off-the clock work. To clock in using the timekeeping software, the employees needed to turn on their computer, log in with their username and/or password, open the timekeeping system and clock in. The employees did not have permanently assigned workstations, and they choose a workstation each shift on a first come, first served basis. While some of the computers were fast, others were "old and slow" and employees sometimes had to try different work-stations before finding a workable computer.

Connexx required its call center workers to be clocked in and ready to accept calls at the scheduled start time of each shift. Because it took additional time to boot up a computer before it was possible to clock in, the employees had to arrive at the call center some amount of time before the scheduled start time of each shift. Compensable work time was computed by rounding to the nearest quarter-hour.

At the end of each shift, employees generally finished any ongoing call, closed out of non-timekeeping programs that were open on the computer, and then clocked out. After clocking out, the employees had to log off the computer or turn it off. The parties disputed how long it generally took employees to boot up and shut down the computers at the beginning and end of each shift. They also disputed whether Connexx required the employees to wait until the computer was fully powered down before leaving for the day.

Cariene Cadena and Andrew Gonzales filed a collective action complaint alleging that Connexx owed its call center employees unpaid overtime wages under the Fair Labor Standards Act ("FLSA") for booting up and shutting down their computers before and after clocking in to the company's timekeeping software program each shift. The District Court granted summary judgment to Connexx and the plaintiffs appealed.

The Ninth Circuit initially remanded, finding that the time call-center employees spent booting up computers is compensable under the FLSA because it is an "integral and indispensable" part of their duties. The Court also noted that in *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220 (2014), the Supreme Court "questioned the application of the *de minimis* doctrine to the FLSA and declined to resolve whether the doctrine continues to apply. The Court remanded the case for the District Court to determine whether: (1) the time spent shutting down computers is compensable; (2) the time spent booting up or shutting down computers was de minimis such that Connexx is not liable for payment of overtime wages for that work under the FLSA; and (3) Connexx had no knowledge of the overtime work and, therefore, is not liable for that alternative reason.

On remand, the District Court granted summary judgment to Connexx once again. The Court concluded the *de minimis* doctrine is applicable notwithstanding *Sandifer*. The Court further held Connexx was not liable for payment of overtime wages because, assuming that both shut down and boot up time are compensable, the time spent on booting up and shutting down the computers was *de minimis* under the three-factor test established in *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984.) Because the time spent was de minimis, the District Court concluded, Connexx was not liable for overtime wages. In the alternative, the District Court held that to the extent any of the time in question was not *de minimis*, Connexx was not liable because Cadena had not met her burden of establishing that Connexx failed to pay for that overtime, in light of the evidence indicating the plaintiffs could request adjustments to their time records. Plaintiffs appealed again.

Cadena argued that the Supreme Court's ruling in *Sandifer*, brings into question the continued validity of the *de minimis* rule. The Ninth Circuit disagreed. The Court found that under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc), a three-judge panel cannot overrule a prior panel's decision in light of subsequent Supreme Court precedent unless the prior decision is irreconcilable. The Court held that there was no such irreconcilable conflict between the Ninth Circuit's *de minimis* case law and *Sandifer.*

The Court concluded that the plaintiffs had raised triable issues of fact as to whether the time in question was *de minimis*. Thus, summary judgment on this basis was improper.

This case is a reminder that employers may be obligated to compensate employees for pre-shift and post-shift activities when such time is integral and indispensable to core job functions. The compensability of pre-shift and post-shift time should be analyzed on a case-by-case basis to determine if such work is necessary to perform core job functions and, if so, the amount of time it takes.

Chapter 5: California Public Records Act

Doe v. Regents of the University of California*, 102 Cal.App.5th 766 (2024*) – UCLA Required To Disclose Investigation Report Into Former Professors' Misconduct

In January 2018, the University of California Los Angeles received a whistleblower complaint alleging that three UCLA professors had participated in serious misconduct. UCLA retained an outside law firm to investigate.

In May 2020, a 60-page investigation report stated that: 1) the professors violated UCLA policy prohibiting improper governmental activities; 2) two of the professors violated UCLA policy and California conflict of interest laws; 3) one of the professors retaliated against another faculty member via 'improper governmental activity' in violation of the UCLA Code of Conduct, and 4) that another professor was "involved in harassing activities."

UCLA issued notices of intent to dismiss two of the professors effective July 2020. All three professors settled their pending disciplinary proceedings with no findings of misconduct, no adjudication regarding the report, and no admissions of liability or unlawful conduct. The professors resigned their employment in connection with their settlements.

In March 2021, a former UCLA employee, requested the report under the California Public Records Act ("CPRA"). The Regents of the University of California notified the former professors, who objected to the release of the report. Each of them sought a writ of mandate to withhold disclosure of the report, known as a "Marken" claim, and the cases were consolidated. The trial court denied the petitions for writ of mandate and a preliminary injunction, allowing the Regents to release the report (with certain redactions).

The trial court found that while the disclosure of the report would likely compromise substantial privacy interests, the report found that the professors committed serious misconduct and provided supporting evidence to substantiate the findings. Thus, the professors did not meet their burden of establishing that the potential harm to their privacy interests outweighed the public interest in disclosure. The trial court postponed the time for release of the documents to allow the former professors to seek appellate review. Two professors appealed.

Before the appeal was heard, the Los Angeles Times (which was not a party in the original proceeding) made its own CPRA request. The Times requested the report, the subsequent settlement agreements between each of the three professors and UCLA, and the notices of intent to dismiss the professors. The trial court determined that the additional documents the Times requested related to well-founded and substantial claims of public employee misconduct and were not exempt from disclosure under the CPRA. The Court of Appeals preliminarily ordered the Regents not to disclose the report or any portion of it to anyone pending resolution of the appeals.

Ultimately, the Court of Appeals affirmed the trial court's orders allowing the Regents to disclose the report, the notices of intent, and the settlement agreements. The Court reasoned that the professors failed to demonstrate that they were likely to prevail in blocking the release of the reports. According to the Court, the "strong public policy supporting transparency in government" inherent in the CPRA outweighed the professors' privacy concerns, so the documents at issue would need to be made subject to disclosure.

This case is a good reminder that a court will apply a balancing test when deciding between the disclosure of arguably private public employee personnel records and the strong public policy supporting transparency in government.

Chapter 6: Labor Law

People ex rel. International Association of Firefighters Local 1319 v. City of Palo Alto,* 102 Cal. App. 5th 602 (2024) – *Court Invalidates Voter Approved Ballot Measure Because City Did Not First Consult In Good Faith With Public Safety Unions

In 2010, the Palo Alto City Council considered altering a provision in its charter. That provision required that certain labor disputes with its public safety unions be resolved through binding interest arbitration. The City believed that the Meyers-Milias-Brown Act (MMBA), at Government Code section 3507, did not require prior good faith consultation with its public safety unions.

The City Council adopted resolution 9189, which proposed that City voters amend the City Charter at article V to repeal binding interest arbitration and replace it with other dispute resolution procedures. The City held a special election in November 2011, and the voters passed Measure D, to repeal binding interest arbitration.

The firefighters' union sued. In prior decisions, the Court of Appeal and the Public Employee Relations Board (PERB) both concluded that the City violated section 3507 by enacting resolution 9189 and submitting Measure D to the voters without having first consulted in good faith with the firefighters' union. The Court of Appeal remanded the case to PERB to determine the remedy.

PERB rejected the City's objections that the City's constitutional home-rule privileges insulated the voter approved Measure D from PERB's remedial reach. PERB ruled that the

City's action to refer Measure D to the voters was void, and directed the City to consult in good faith with the firefighter's union upon request. Both the firefighters' union and the City, however, disagreed about whether the City complied with PERB's orders. The City did not reinstate the charter provision as it existed prior to the passage of Measure D.

The firefighters' union then requested the California Attorney General ("AG") to bring a quo warranto action to decide the remedy to the MMBA violation. The AG may authorize the use of the quo warranto procedure, under Code of Civil Procedure section 803, to sue on behalf of the people to determine whether any corporation – including a municipal corporation – has unlawfully held or exercised any franchise within the state. The AG authorized leave to sue, noting that the public has an interest in ensuring that City Charter amendments are validly enacted.

The firefighters' union filed the quo warranto complaint. The union argued that the trial court should invalidate Measure D because the City failed to consult in good faith before placing it on the ballot. The City argued that the voter's election was not an unlawful exercise of a franchise, and that the City's MMBA violation should not invalidate the will of the electorate.

The trial court did not invalidate Measure D. Instead, it retained jurisdiction for the limited purpose of issuing a final judgment invalidating Measure D if: the City and the firefighters' union agreed to use alternative procedures to binding interest arbitration; or the City passed a resolution to pursue a charter amendment alternative to Measure D; or PERB determined that the City failed to consult in good faith with the affected public safety unions. The firefighters' union appealed. The Court of Appeal concluded that once the trial court determined that the City's submission of Measure D to the voters violated the MMBA, the trial court abused its discretion by failing to invalidate Measure D. The Court remanded the case to the trial court to: 1) order the City to restore the re-amendment portion of article V to the City's Charter; 2) invalidate Measure D; and 3) provide any other appropriate relief.

This case is a critical reminder that public agencies with represented employees must engage in the meet and confer process when modifying charter provisions or policies that impact represented employees or are within the scope of representation.

County of Santa Clara*, PERB Decision No. 2900-M (2024, judicial appeal pending) – *PERB Says Prevailing Party Is Not Entitled to Attorney's Fees Absent Special Circumstances

SEIU, Local 521 and Santa Clara County were parties to a memorandum of agreement ("MOA") regarding physician assistants ("PAs"). PAs were required to maintain certain professional certification standards.

In 2019, the County disciplined a PA for allegedly failing to maintain the professional certification that the County bylaws required. The PA filed a grievance and won. The County then substantially revised the certification bylaws.

SEIU filed a PERB unfair practice charge alleging violations of the Meyers-Milias-Brown Act ("MMBA"). SEIU claimed that the County unlawfully refused to bargain before its

Board of Supervisors ("BOS") approved the County's bylaw revisions. Those revisions included new certification standards for SEIU-represented employees. PERB held that that the County violated its bargaining duties both with respect to the BOS' decision and its effects, because the certification bylaws were within the scope of representation.

However, PERB rejected SEIU's request to include attorney's fees as a standard, make-whole remedy. PERB explained that, except in cases in which there is a statutory right to attorney's fees, a successful party cannot require the other party to pay its fees. A party in a PERB case seeking fees must normally show that its opponent pursued a claim, defense, or motion, or used a tactic without arguable merit and in bad faith.

PERB rejected the idea that, as a matter of course, a successful charging party should receive reimbursement of litigation expenses. PERB rejected SEIU's request for attorney's fees in this case as the County did not assert a frivolous, or bad faith defense.

The takeaway for employers in this case is that regarding an award of attorney's fees, PERB will not automatically award attorney's fees just because the employee organization ultimately prevails. Rather, this decision demonstrates PERB can follow the "American Rule," pursuant to which a successful party normally has no claim to fee shifting. Under this rule, a party in a PERB case seeking to recover attorney fees and costs must show that its opponent maintained a claim, defense, or motion, or engaged in another action or tactic, that was without arguable merit and pursued in bad faith.

Oakland Unified School District*, PERB Decision No. 2906-E (2024, judicial appeal pending) – *A Union May Rebut the Presumption Against a Pre-Impasse Strike When an Employer's Unfair Practices Provoke the Strike

In *Oakland Unified School District*, PERB held that the right to strike is qualified, and that one qualification restricts pre-impasse strikes pressuring an employer to make concessions in collective bargaining. As a result, there is a presumption against pre-impasse strikes that a union may rebut by showing that an employer's unfair practices materially provoked the strike.

In March 2019, the Oakland Unified School District ("District") implemented a Nine-Month Notice Policy for school closures that the Union had long sought. In 2022, the District reversed course, scheduling school closures without the nine-month notice period. In response, the Oakland Education Association ("OEA") brought an unfair practice charge alleging that the District failed to meet and confer over its decision to close schools without adhering to the Nine-Month Notice Policy. In *Oakland Unified School District* (2023) PERB Decision No. 2875 ("UPC 1"), PERB resolved the school closure charge in OEA's favor finding that the District violated the Educational Employment Relations Act ("EERA") when it failed to afford OEA notice and an opportunity to bargain over the District's decision.

While the charges in the aforementioned UPC 1 were pending, the District began implementing the school closures at issue, without adhering to the Nine-Month Notice Policy. The Union organized a one-day strike in response to what it perceived to be unfair labor practices, specifically, refusal to meet and confer over the failure to adhere to the Nine-Month

Notice Policy. The union's strike announcements, notices, and other materials specifically referenced the District's refusal to adhere to their policy as a reason for the strike. The strike also occurred while the District was implementing the school closures.

The District argued that the strike was illegal and sought injunctive relief against OEA's planned one-day strike. The administrative law judge denied the District's request for injunctive relief but a complaint was issued in the instant case, No 2906-E, ("UPC 2"). OEA appealed the issuance of the complaint to PERB.

On June 28, 2024, PERB issued its ruling on UPC 2. PERB began by giving a detailed history of the evolution of the right to strike for public employees. PERB explained that the EERA (like the Meyers-Milias-Brown Act ("MMBA"), and all other statutes PERB enforces) provides employees with the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations, which confers a qualified, statutory right to strike, including a "right to strike in protest against unfair practices." PERB explained that the nature of the qualified right has changed over time, but even the California Supreme Court relied on the MMBA and other authority to find that public employees have a "basic right to strike" unless doing so imminently and substantially threatens public health or safety (citing *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564).

PERB continued by explaining that since *County Sanitation*, the Legislature has vested PERB with jurisdiction over labor relations at California cities, counties, and local agencies covered by the MMBA. In 2010, the California Supreme Court decided *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597 (*"San Jose"*), which cemented the Court's recognition of PERB's exclusive jurisdiction to interpret the labor relations statutes under its jurisdiction to determine which strikes are lawful and protected and which constitute statutory violations.

PERB noted that the Court's ruling in *San Jose* also highlighted that, following legislative changes that transferred to PERB jurisdiction over the MMBA, PERB's role includes determining the scope of strike protections and prohibitions under the MMBA. This move, PERB explained, was intended to integrate existing precedents into PERB's jurisdiction, thus ensuring that the principles governing strikes under the EERA would similarly apply to the MMBA. The Court in *San Jose* rejected arguments that the right to strike was solely a common law principle, affirming that it is an integral part of labor relations statutes and must be interpreted in light of broader statutory goals. PERB also explained how subsequent PERB rulings have consistently upheld this qualified right, reinforcing that while public employee strikes are protected to some extent, they are subject to limitations based on good faith bargaining and other statutory requirements.

PERB noted that recent appellate decisions have further reinforced the statutory protection of strikes. For instance, in *County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, the court found that actions discouraging future strike activities were discriminatory and interfered with protected rights.

However, PERB emphasized that the right to strike remains qualified, with restrictions such as avoiding substantial threats to public health and safety, maintaining the status quo as per no-strike agreements, and refraining from bad faith bargaining tactics. Applying these principles to the issues in UPC 2, PERB reasoned that the current complaint against OEA centers on whether their strike constituted a pre-impasse pressure tactic rather than an imminent threat to public welfare.

PERB found that here, the District failed to establish OEA violated its duty to bargain. PERB reasoned that OEA had no duty to bargain because the District failed to provide notice and opportunity to bargain in good faith over its decision to waive the nine-month requirement before closing or consolidating schools. OEA, therefore, had no duty to pursue negotiations.

PERB continued to explain that a union's duty to bargain in good faith qualifies its right to strike. One qualification restricts pre-impasse strikes pressuring an employer to make concessions in collective bargaining. As a result, there is a presumption against pre-impasse strikes, but a union may rebut the presumption by showing that employer unfair practices materially provoked the strike. Here, PERB found that OEA rebutted the presumption because District unfair practices materially provoked the strike.

PERB also took the opportunity to explain the factors relevant to assessing a strike's motivation, explaining that the determination of whether an unfair practice at least partially motivated a strike requires reviewing the totality of circumstances. Looking at the union's strike announcement or notices, and other materials, is a good indicator as to the strike's context and purpose, according to PERB. Here, the materials centered on the District's conduct as the motivation for the Strike. PERB also noted that a strike's timing relative to the employer's alleged violation is relevant, a factor here that favored OEA. PERB overruled decisions indicating that a pre-impasse strike must be seen as a "last resort" by the union, finding that factors such as the violation's nature and seriousness, and whether the union opposed the violation, as more relevant to determining a strike's purpose.

Applying these factors here to the totality of the circumstances, PERB found that OEA rebutted any such presumption because the District's unfair practices materially caused OEA's strike.

This decision is noteworthy because it provides a rare and valuable summary of the law concerning a public employee's right to strike, as well as clarifying and describing the factors and standards PERB will consider when analyzing a pre-impasse strike based on an employer's alleged unfair practices. Another important take away for employers is that while the employer in this case was a school district that was found to have violated the EERA, PERB based much of its decision on authority made under the MMBA. This demonstrates that a similar challenge under the MMBA directly would likely lead to a similar result.