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# Labor and Employment Litigation Update

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# Labor and Employment Litigation Update Spring 2023

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## I. INTRODUCTION

In the last six months, California and Federal appellate courts 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 highlighting in this update as they are particularly impactful on employment in the public sector.

The recent case decisions discussed herein cover a wide range of employment issues that public agencies commonly face. Amongst these decisions, we saw several cases brought by public employees alleging violations of the First Amendment by employers. What stands out is the level of attention the appellate courts paid in their analysis of whether the employee was speaking on a matter of public concern and how the employer handled disciplining the employee for their speech. The decisions in these cases, amongst the other cases involving employee retaliation complaints, serve as an important reminder for employers to be careful in issuing discipline based off the content of an employee's speech.

In addition to cases involving violations of the First Amendment, the past sixth months brought cases resulting in a new analysis of Whistleblower complaints and 1983 claims, highlighted how employers should treat military leaves under USERRA, as well as impacted bargaining practices for agencies and unions, and many more.

The next section includes cases with key developments in labor and employment law. We broke down these cases into three categories: (1) Harassment, Discrimination, and Retaliation cases; (2) Employee Leaves cases; (3) Employee Discipline cases; and (4) Labor Law cases. Additionally, at the end of this update in chapter (5) "Eye to the Future" we included two particularly relevant case decisions pending review in the California Supreme Court, as well as some proposed legislation that could have profound impacts on public employment.

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## II. CASES

### Chapter 1: Harassment, Discrimination, and Retaliation

***Kaur v. Foster Poultry Farms LLC, 83 Cal.App.5th 320 (2022) - WCAB's Denial Of Discrimination Claim Does Not Stop FEHA Discrimination Claim***

In September 2022, the Court of Appeal decided *Kaur v. Foster Poultry Farms LLC*, which affirmed that a Workers' Compensation Appeals Board (WCAB) decision did not prevent an employee from filing claims under the Fair Employment and Housing Act.

In 2013, Gurdip Kaur, an employee at Foster Poultry Farms LLC, slipped at work while wearing company-issued rubber boots and broke her wrist. After surgery, Kaur returned to work and despite her work restrictions, Foster Farms forced her to perform her normal job duties. Kaur struggled to perform her normal job duties, but Foster Poultry denied her requests for an accommodation. She was terminated in late 2013, but was then reinstated after contesting her termination. In 2016, Foster Poultry restructured and gave her a new job she could not perform one-handed, so she was terminated again.

In 2016, Kaur filed a petition against Foster Poultry with the Workers' Compensation Appeals Board (WCAB) alleging discrimination for filing her claim, in violation of Labor Code Section 132(a). Her claim was heard in an administrative hearing and was eventually denied.

In 2017, before her workers' compensation claim was decided, Kaur also sued Foster Poultry under the FEHA. Kaur's five FEHA claims were centered around discrimination due to race/nationality and disability. When Kaur's workers' compensation claim was denied, Foster Poultry asserted an affirmative defense to Kaur's lawsuit, arguing that all of Kaur's disability related claims were barred by the legal doctrines of res judicata and collateral estoppel. Simply put, these doctrines generally preclude a person from re-litigating issues that were argued and decided in prior proceedings, even if the second lawsuit raises different causes of action. Together, these doctrines can be referred to as "issue preclusion."

The trial court granted summary judgment for Foster Poultry due to its affirmative defense. Kaur appealed. The primary issue on appeal was whether the trial court properly decided that the WCAB's denial of Kaur's 132(a) claims precluded her FEHA claims. The California Court of Appeal held that Kaur's FEHA claims were not precluded.

For an issue to be precluded, the issue must be identical to that decided in a former proceeding. The issue must also have been actually litigated and necessarily decided in the former proceeding. In addition, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

The Court of Appeal focused on the first prong of the above test, i.e., whether the issues were identical. In the WCAB claim, the issue was whether Kaur experienced discrimination on account of the industrial nature of her injury. On the other hand, Kaur's FEHA claims were broader, and centered on whether she experienced discrimination on account of her disability, and whether she was unlawfully discharged because of her disability. Moreover, Kaur's other FEHA claims, such as her allegations that she was not provided a reasonable accommodation and was not engaged in a good faith interactive process, involved entirely different issues from the WCAB claim. The Court further found that, in deciding the WCAB issue, the administrative hearing judge ignored certain FEHA requirements because the issue was so distinct from FEHA and involved different considerations.

For all these reasons, the Court of Appeal held that the denial of the WCAB claim did not preclude Kaur's FEHA claims, and she could move forward with her lawsuit.

A concurring opinion cautioned that this decision should be interpreted narrowly, and that the decision did not mean that factual findings by an administrative hearing judge on a WCAB claim can never result in issue preclusion on a FEHA claim. Rather, the opinion noted that one must look carefully at the underlying issues and findings of fact. A claim decided in a WCAB setting may indeed prevent a FEHA claim if the issues and inquiries are similar enough.

The *Kaur* case emphasizes the need for public agencies to be aware that the FEHA may apply with respect to both industrial and non-industrial injuries and illnesses.

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***Killgore v. SpecPro Services, LLC 51 F.4th 973 (9th Cir. 2022) - An Employee's Communications To A Supervisor Regarding Possible Unlawful Activity Triggered The California Whistleblower Protection Act***

In October 2022, the Ninth Circuit Court of Appeals held that employee's disclosures to his supervisor, as a person with authority over him, provided an independent ground for asserting a whistleblower retaliation claim under California's Whistleblower Protection Act. *Killgore v. SpecPro Services* serves as a reminder for employers to take employee's concerns of wrongdoing by their employers or supervisors seriously and to promptly investigate.

SpecPro Professional Services, LLC, is an environmental services firm that assists government agencies with the preparation of environmental assessments. The U.S. Army Reserve Command hired SpecPro to assist in preparing an environmental assessment for a new helicopter training area.

Aaron Killgore, an employee at SpecPro, was assigned this project. Killgore had a small team of colleagues and reported to his supervisor, William Emerson. Killgore also reported to Chief Laura Caballero, the Army Reserve's project leader.

Killgore and his team discovered that there were discrepancies between the facts they had found on the ground and what the Army Reserve wanted SpecPro to report in their environmental assessment. When Caballero directed Killgore to omit certain information from the report, Killgore pushed back and told Caballero that failing to report certain facts would violate a federal law called NEPA and other federal regulations.

Following this pushback, Caballero called Emerson to raise concerns about Killgore. Emerson then told Killgore to complete the report on time and to exclude the information that Caballero wanted excluded. Killgore again explained that this might be illegal, but Emerson told Killgore that their chief goal was to keep Caballero happy to win any future Army Reserve contracts.

Killgore and his team eventually drafted the environmental assessment and included the information that Caballero wanted excluded. Caballero then instructed the team to take out the

information and complained to Emerson and the general manager of SpecPro during a meeting. After this meeting, Emerson fired Killgore for failing to meet company and customer expectations.

In May 2018, Killgore filed a lawsuit against SpecPro, asserting that his termination violated the California Whistleblower Protection Act (CWPA). Labor Code section 1102.5 provides whistleblower protections to employees who disclose wrongdoing to authorities. Specifically, section 1102.5 prohibits an employer from retaliating against an employee for sharing information the employee “has reasonable cause to believe . . . discloses a violation of state or federal statute” or of “a local, state, or federal rule or regulation” with a *government agency*, with a *person with authority over the employee*, or with *another employee who has authority to investigate or correct the violation*. [emphasis added].

The District Court dismissed Killgore’s lawsuit because it ruled that Killgore’s communications to Emerson and Caballero were not protected by the CWPA. The District Court decided that because Emerson, a private citizen in the employ of a private business, did not have the power to correct the Army Reserve’s noncompliance, Killgore’s communications to Emerson were not protected. In doing so, the District Court interpreted section 1102.5(b) to mean that a protected disclosure must be made to “a person with authority over the employee” who also has the authority to “investigate, discover, or correct” the violation.

Emerson then appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit took up the question of whether Killgore’s communications were protected.

The Ninth Circuit found that the District Court incorrectly interpreted the CWPA by limiting the avenues for employees to report wrongdoing. The Ninth Circuit held that the CWPA prohibits employers from retaliating against employees who disclose potential wrongdoing through any one of several avenues: government or law enforcement agencies; a person with authority over the employee; other employees with authority to investigate, discover, or correct the violation or noncompliance; or any public body conducting an investigation, hearing, or inquiry.

The *Killgore* case is a helpful reminder of the statutory framework for whistleblower claims. If an employee comes to a supervisor, or to any individual who has any authority to investigate or correct a violation of the law, it should be treated as a protected CWPA communication and investigated.

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***Opara v. Yellen, 57 F.4th 709 (9th Cir. 2023) - Little Direct Evidence of Age-Related Discriminatory Animus is Necessary to Establish a Prima Facie Case of Age Discrimination***

Opara was born in 1954 and is Nigerian. Opara served as an IRS Revenue Officer for twenty-seven years. As a Revenue Officer, Opara was responsible for using the IRS’S integrated data retrieval system (“IDRS”) to access information for taxpayers assigned to her, as well as assisting walk-in tax payers who were not assigned to her. The Treasure Department’s IRS

terminated her after determining that Opara committed several Unauthorized Access of Taxpayer Data (“UNAX”) offenses.

As part of her position, Opara received annual training on proper usage of the IDRS which focused on UNAX trainings and signed “Certifications of Annual UNAX Awareness Briefings” as well as the IRS’s IDRS Security Rules. The IDRS Security Rules explicitly state: “(1) Do not attempt to access (research or change) your own account or that of a spouse, other employee, friend, relative, or any other account in which you may have a personal or financial interest; and (2) Access only those accounts required to accomplish your official duties. You have no authority to access an account of a celebrity or well-known taxpayer unless you are assigned such an account.”

There were two tax interactions at issue that precipitated Opara’s termination from the IRS. First, Opara used the IDRS to access tax records of two married and jointly filed taxpayers she personally knew from her religious congregation on two occasions. She further called the IRS service center to inquire about notifications on their account in the IDRS. Second, IRS electronic records showed again that she accessed the tax records via IDRS of two different married and jointly filed taxpayers two times. This time she knew the husband and his father since they worked as contractors at her home in early 2016.

Following Opera’s call to the IRS service center on behalf of the taxpayer she knew from her religious congregation, the campus employee who spoke with Opara sent an email to Opara’s manager. Opara’s manager then contacted the Treasury Inspector General for Tax Administration (“TIGTA”) regarding a possible issue. In the TIGTA Memorandum documenting the interview, Opara was asked “Have you ever committed UNAX?” Opara in response stated “she could not recall as she was almost 63 years old and she had difficulties recalling.” When asked if she accessed IRS records of anyone she knew personally,” she “claimed that she could not recall.” However, when they asked if she knew the tax payers in question, she stated she knew them through church.

On August 2, 2017, following the interview with TIGTA, Opera’s access to all IRS computer systems - including IDRS and email was suspended, which was a standard procedure when employees were under investigation for UNAX violation. During that time she was reassigned to perform administrative work. On October 23, 2017 Opara received a “Notice of Proposed Adverse Action” from the IRS Territory Manager enumerating six instances in which she “improperly accessed taxpayer data on the IDRS without an official reason to do so” and proposed removal. At the oral hearing, Opara asserted that the hearing official was aware of her previous successful EEO complaint against his assigned mentee involving disparaging remarks on age and national origin, including general comments that “if anyone is too old to do this job, she should quit” and that the “job was better with young people.” Opera also attributed her misconduct, at least in part to a language barrier.

Following her hearing, Opara received a termination letter from management explaining that “after reviewing the evidence and the IRS Manager’s Guide,” she decided that Opara’s misconduct is a UNAX and discharge was the proper penalty. She also found Opara to be

“evasive and misleading” in her interview with TIGTA because she repeatedly indicated that she could not recall if she accessed IDRS records for people she personally knew, citing her age and failing to take responsibility for her actions.

On August 20, 2018, Opara filed a formal EEO complaint against the Department of Treasury alleging that agency management discriminated against her based on her age and national origin. She then filed a lawsuit against the Secretary of the Treasury in the U.S. District Court for the Central District of California asserting claims of discrimination based on age and national origin. The District Court granted summary judgment for the Treasury Secretary concluding that Opara (1) failed to establish a prima facie case of age discrimination; and (2) failed to show the reasons for Opara’s termination were pretextual for age and national origin discrimination. The District Court further reasoned that management had to recommend removal for the assessed UNAX violations and that there were “legitimate, nondiscriminatory reasons” justifying Opara’s reassignment to administrative work after losing access to the IRS’s electronic systems.

On appeal, the Ninth Circuit Court of Appeals held that the record supported Opara’s prima facie case of age discrimination. The Court agreed with the trial court in that most of Opara’s evidence is comprised of “circumstantial evidence” including her “superiors’ alleged exaggeration of offenses, assignments of menial tasks,” and selection of draconian penalties, etc.” However, the Court focused on the scant direct evidence of illegal animus, e.g., that she previously lodged a successful EEO complaint, involving comments that “if anyone is too old to do this job, she should quit” and that “the job was better with young people.” The Court considered whether the person involved in these comments was someone who was “involved in the decision-making process.” The Ninth Circuit reasoned that because “very little evidence is necessary” to establish a prima facie case through direct evidence, the Court was satisfied that the record taken as a whole, supports Opara’s prima facie case of discrimination.

The Court also found the Secretary offered legitimate, non-discriminatory reasons for its decision to terminate Opara. The reasons cited included the IRS Manager’s Guide including instructions to propose removal, her reassignment to normal administrative work following her suspended access to the IDRS system, and finally the IRS Manager’s Guide to terminate Opara as a penalty for UNAX violations.

The *Opara* case demonstrates that discrimination claims, even those brought in federal court, only require minimal direct evidence animus towards a protected category to establish a prima facie case of discrimination. This case also highlights the fact that the employer’s ability to prove it had legitimate (aka objectively reasonable) reasons for its decisions will determine whether the employer prevails or not in a discrimination lawsuit.

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***Atalla v. Rite Aid Corporation, F082794, Super. Ct. No. 19CECG00569 (Filed 2/ 24/23; Cert. for Publication 3/14/ 23) - Inappropriate Text Messages from Supervisor Outside Scope of Employment Not Imputable to Employer***



The California Court of Appeal in the Fifth Appellate District recently decided in *Attalla* that inappropriate text messages from a supervisor to an employee could not be imputed to the employer in a FEHA claim where the supervisor and subordinate had a pre-employment relationship and the texts were not sent in the supervisor's capacity as a supervisor.

Erik Lund was a district manager for Rite Aid in the Fresno area. Hanin Atalla met Lund in fall 2017 during her last year of pharmacy school, when she did a six week "business administrative rotation with Rite Aid" which included shadowing Lund. After the rotation, she stayed in close touch with Lund and developed a social relationship with him. From May 2017-February 2018, while in pharmacy school, she worked on a part-time basis as a pharmacy intern at Rite Aid. She later began working as a graduate intern, and in December 2018 she became an hourly staff pharmacist at Rite Aid. Lund was the supervisor of graduate interns and staff pharmacists.

While Atalla worked at Rite Aid she became close friends with Lund and viewed him as a mentor. Attalla and Lund both stated in their depositions that they had been friends before she joined Rite Aid. They often went to lunch together and texted frequently, often joking with one another in their texts, and texting about a wide range of things including food, vacation, travel, exercise, weight loss, family, and personal matters. They also texted about work.

One month after Atalla and Lund dined together to celebrate her birthday, they engaged in their final text exchange on their personal phones. Lund and Aatalla were exchanging texts about drinking wine and vodka. Lund then texted Atalla a live photo of him masturbating and a text saying "I am so drunk right now." Lund then sent another text stating, "Meant to send to wifey," followed by "Going to go die" Attalla responded, "It's ok, I deleted it before I end up in a divorce." He later sent an additional photo of his penis and Attalla asked him to stop. Lund replied "you are right" and the next day he texted her to apologize.

Atalla called in sick for work the next week. Lund asked Atalla whether she was still sick, but Attalla did not respond and blocked his number. On January 10, 2019, Attalla's counsel sent a letter to Ride Aid asserting a claim of sexual harassment. Her counsel informed Rite Aid she would not be returning to work there.

Ride Aid suspended Lund and investigated whether there were any other complaints of sexual harassment against him (there were none). Ride Aid made the decision to terminate Lund and assured Atalla's counsel that she was welcome to return to work. Atalla refused to return to work, and on January 21, 2019, Rite Aid changed Atalla's status in their system to "resignation with the possibility of re-hire" and issued her a separation notice, along with her vacation payout.

Atalla eventually filed an action in the Fresno County Superior Court against Rite Aid and Lund alleging sexual harassment, failure to prevent sexual harassment, wrongful constructive termination, discrimination and retaliation. The trial court granted summary judgment for Rite Aid, principally on the grounds that the sexual harassment arose from a completely private relationship unconnected with their employment.

The Court of Appeal affirmed, noting that while an employer is ordinarily strictly liable for harassment by a supervisor, the supervisor must be acting in his capacity as a supervisor when the harassing conduct occurs. The Court of Appeal found that the late-night text exchange in question “occurred outside the workplace and outside of work hours,” and was “spawned from a personal exchange that arose from a [pre-existing] friendship between them.” In its analysis, the Court focused on the timing of the exchange and the fact that the participants were engaged in personal pursuits that the time.

In our view, the *Attala* case is a bit of an outlier since it turned on the fact that the plaintiff and alleged harasser had a longstanding preexisting friendship before they worked together. This is not usually the case in these situations, and further if any additional acts of harassment had occurred where Lund was performing his work duties the result likely would have been different.

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***Houston Community College System v. Wilson (2022) 142 S. Ct. 1253, 1258, 212 L. Ed. 2d 303- A Board’s Censure of its own Member was Lawful***

In March 2022, the U.S. Supreme Court issued the *Houston Community College System* decision, demonstrating how the First Amendment applies to governing boards and exercising their freedom of speech. Specifically, this case is an example of how a public governing board could legally issue public censures on its own board members.

In 2013, the Houston Community College System (HCC), a public entity operating various community colleges, elected David Wilson to the Board of Trustees. Wilson often disagreed with the Board about the best interests of HCC and brought multiple lawsuits challenging the Board’s actions. By 2016, Wilson’s escalating disagreements led the Board to publicly reprimand him. Mr. Wilson continued to charge the Board in media outlets and state-court actions with violating its ethical rules and bylaws. Wilson arranged robocalls to the constituents of certain trustees to publicize his views. At a 2018 meeting, the Board adopted a public resolution “censuring” Wilson and stating that his conduct was inconsistent with the best interests of the College, and “not only inappropriate, but reprehensible.” Additionally, the Board imposed penalties which deemed him ineligible for Board officer positions during 2018.

Wilson claimed that the HCC Board’s censure violated the First Amendment of the U.S. Constitution. The Fifth Circuit concluded that a verbal “reprimand against an elected official for speech addressing a matter of public concern is an actionable first amendment claim under section 1983.” HCC appealed to the U.S. Supreme Court.

On appeal, Wilson reiterated his claim that the verbal censure he receive was a retaliatory action after the fact for his protected speech.

The Court began its analysis by stating it would give “long settled and established practice” regarding the meaning and application of the U.S. Constitution “great weight.” The Court noted that since colonial times, assemblies had the power to censure their members at the

federal, state, and local level. Thus, verbal censure is in line with centuries of a practice that has been found to be consistent with the First Amendment.

The Court next analyzed the First Amendment claim under the contemporary doctrine, which requires the individual suing to show, among other things, that the government took a material adverse action in response to the individual's speech that it would not have taken absent the retaliatory motive. The Court held that a verbal censure was not a material adverse action for two important reasons. First, Wilson was an elected official. Elected officials are generally expected to shoulder a degree of criticism about their public service and continue exercising their free speech rights when the criticism comes – in this case in the form of a verbal censure. Second, this censure was simply a form of speech that admonishes another member of the same governmental body. The First Amendment guarantees the right to speak freely on questions of government policy, so one's individual's speech cannot "be used as a weapon to silence other representatives seeking to do the same." By attempting to sue the Board and HCC for this censure, Wilson was attempting to silence the Board's proper exercise of its First Amendment rights.

The Court said its conclusion was bolstered by the fact that after receiving the verbal censure, Wilson continued to fight for what he thought was right. Indeed, Wilson had already received another verbal censure that did not come with additional disciplinary attributes. Wilson did not contest that this censure violated the First Amendment. The Court found this cut against Wilson's case because Wilson was essentially arguing that a verbal censure that also carries discipline was more material than a "plain" verbal censure. The Court implied that "discipline," such as not being able to hold certain positions, does not actually materially affect an individual's ability to speak freely and exercise their First Amendment rights.

A significant factor in the Court's analysis was that this censure was from members of a governing body against another member, that is, peer-to-peer. None of the censoring members had any amount of inordinate power over the censured member. Another significant factor the Court noted was that a verbal censure is simply a statement that reprimands the receiving individual and that the censure was itself an exercise of First Amendment Rights.

This case illustrates the latitude a governing board has to censure and punish its own members. However, the Court did mention that certain censures from a body with more power and agency, against an individual with less, may indeed amount to a First Amendment violation.

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***Bresnahan v. City of St. Peters 58 F.4th 381 (8th Cir. 2023) - Discipline for Former Police Officer's Shared Controversial Video Met Threshold for Asserting First Amendment Claim***

While not decided by the Ninth Circuit Court of Appeals, and thus is persuasive authority only, the Eighth Circuit recently decided a First Amendment case that involves an issue that public employers have faced or will undoubtedly face at some point, i.e., a public employee's dissemination of controversial material using city-owned devices or in a situation with some nexus to the employee's employment.

In *Bresnahan*, a former police officer (Bresnahan) sued the City of St. Peters, Missouri, the Chief of Police, and City Administrator under 42 U.S.C. section 1983 alleging a violation of his First Amendment Rights. The district court dismissed Bresnahan's complaint which the U.S. Court of Appeals reversed and remanded the case to the lower court.

Bresnahan specifically alleged that St. Peters Police Department created a text messaging group to update each other about local Black Lives Matter (BLM) protests. Although this group was intended for official purposes for information and updates regarding BLM protests, the officers also shared "unrelated" content on it.

Bresnahan sent the group a video from the sitcom "Paradise PD" showing a black police officer who accidentally shot himself. The video included a media headline stating "another innocent black man shot by a cop." Bresnahan claimed the video was satire and a parody of the BLM protests and said he shared the video because he was critical of the protests.

Another officer in the group complained about the video. The next morning, the Chief ordered Bresnahan to resign. The Chief told Bresnahan that if he refused the Chief would open an investigation and recommend to the City Administrator that Bresnahan be fired. Bresnahan resigned and alleged under section 1983 he was retaliated against for exercising his first Amendment right to speech.

The City filed a motion to dismiss, which the district court granted. Bresnahan appealed, and on appeal the Eight Circuit analyzed the case utilizing the Supreme Court's *Pickering* test from its landmark decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and its later decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Taking the facts alleged in Bresnahan's complaint as true, the appellate court noted that the threshold question was whether Bresnahan spoke in his capacity as a private citizen on a matter of public concern.

The Eighth Circuit found that the video involved a matter of public concern because it referenced a police officer shooting a black man and it is widely known that BLM'S central goal is to stop police brutality. The court explained that "speech criticizing the media's coverage of a particular subject qualifies as a matter of public concern" and taken as a whole, the video shows that Bresnahan's speech involved a matter of public concern.

The Eighth Circuit also found that Bresnahan was acting as a private citizen when he sent the video. While generally speech shared with coworkers, as opposed to the press or public, is not considered speech involving a matter of public concern, it is a highly fact specific inquiry and not a bright line rule. The court reasoned that the fact that Bresnahan's coworkers were police officers is important as they regularly communicated about local protests and were "a local focal point of the BLM movement."

For these reasons, the case was reversed and remanded to the district court. The opinion expressly notes that the decision is limited to whether Bresnahan met the threshold for advancing a First Amendment claim, and did not address the merits of his claim.

Given the procedural status of the case, as well as the fact that it is not binding authority in Ninth Circuit jurisdictions, the *Bresnehan* case should not be overly relied upon. The decision is helpful, however, to help understand how a not-so-unique fact pattern may play out in a similar situation for a jurisdiction that is in the Ninth Circuit.

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***Kirkland v. City of Maryville, Tennessee, 54 F.4th 901 (6th Cir. 2022) - Employee's Critical Facebook Post Warranted Disciplinary Action and Did Not Violate First Amendment***

The Sixth Circuit Court of Appeals also recently decided a First Amendment retaliation case that may be of interest to public employers under the Ninth Circuit's jurisdiction. While only persuasive authority, the underlying facts are those that public employers now sometimes face and may be useful guidance for public employers facing a similar fact pattern.

In *Kirkland*, a former city police officer sued after being fired for using social media to post critical statements about a county sheriff. The officer in question periodically used her Facebook account to criticize the county sheriff, i.e., the head of another law enforcement agency. Kirkland's supervisors asked her to stop because they were concerned that her posts would undermine the Department's relationship with their sister law enforcement agency. They also reprimanded her for other behavior issues.

Kirkland was undeterred and made a Facebook post claiming the sheriff excluded her from a training event because she was female and opposed his reelection. The City fired Kirkland. Kirkland responded by suing her city, alleging retaliation in violation of the First Amendment, amongst other claims. The district court granted summary judgment in the city's favor and the Sixth Circuit Court of Appeals affirmed.

As for the First Amendment retaliation claim, the Sixth Circuit utilized the *Pickering* balancing test. In so doing, the court explained that Kirkland's speech would be constitutionally protected if: (1) if she was speaking as a private citizen and not pursuant to official duties, (2) her speech was on a matter of public concern, and (3) her speech interest outweighs the City's interest in "promoting the efficiency of the public services it performs through its employees." The parties did not contest whether the statements at issue were made in Kirkland's capacity as a private citizen, so the court addressed whether her speech addressed a matter of public concern.

To determine whether the speech is a matter of public concern, the court looked to the content, form, and context of Kirkland's statement, as viewed by the whole record. The court found that Kirkland's post, suggesting sex discrimination and political retribution by an elected official was an issue of public concern as the content is something the public has an interest in hearing.

However, the court also found that under the *Pickering* test the next question was whether Kirkland's speech interest in commenting on matters of public concern weighed against the city's interest, as an employer, in executing its public services. The Sixth Circuit agreed that the city's concern that Kirkland's Facebook post threatened to undermine its police department's working relationship with the office of the county sheriff was sufficient to justify

Kirkland's termination. It is noteworthy, however, that the court did not rely on the "last straw" statement that led to her termination and noted that Kirkland had a long history of conflict and other performance issues.

While only persuasive authority, *Kirkland* may be helpful guidance where public employer's use social media accounts for postings which conflict with the employer's interests. Whether the Ninth Circuit would adopt the same approach as the Sixth Circuit is still a bit uncertain, however.

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## **Chapter 2: Employee Leaves**

### ***Clarkson v. Alaska Airlines, Inc. 59 F.4th 42 (9<sup>th</sup> Cir. 2023) - Ninth Circuit Says A Jury Should Decide Whether Non-Military Leaves Are Comparable To Military Leaves Under USERRA***

Earlier this year, the U.S. Court of Appeals for the Ninth Circuit issued the *Clarkson v. Alaska Airlines* ruling, serving employers a reminder to be careful and consistent in their treatment of employees going on leave, particularly military service employees going on military leaves with a similar duration as a different type of leave.

The Uniformed Services Employment and Reemployment Act (USERRA) says at section 4316(b)(1) that a person absent from employment due to service in the uniformed services shall be "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer" to other employees on non-military furloughs/leaves of absence.

Casey Clarkson, a commercial airline pilot and military reservist, sued his employer for violating the USERRA by not paying pilots who took short-term military leave (less than 30 days) while paying pilots who took short-term jury duty, bereavement leave, or sick leave. Clarkson's employer, Alaska and Horizon Air, moved for summary judgment, claiming that military leave is not comparable to non-military leave "as a matter of law." The Airlines reached this conclusion by considering military leaves of all lengths. Clarkson focused his analysis on only short-term military leaves. The District Court granted summary judgment for the Airlines, and Clarkson timely appealed.

The Ninth Circuit Court of Appeals first found that the district court erred by comparing all military leaves, instead of just the short-term military leaves at issue in this case. The Ninth Circuit noted that the USERRA regulation at 20 CFR Section 1002.150 lists three comparability factors: duration of leave; purpose of leave; and ability of employee to choose when to take the leave (aka control). The Ninth Circuit stated that the duration of the leave was the most important factor. It reasoned it is entirely possible that a two-day military leave may be comparable to a two-day funeral leave.

Next, the Ninth Circuit found that the issue of comparability of military and non-military leaves was a question of fact for the jury, particularly because the parties had factual disputes

relating to all three comparability factors. Regarding the duration factor, there was contradictory statistical evidence due to Clarkson pulling statistics based on short-term military leave alone, while the Airlines looked at all military leaves when compiling their data. Regarding the purpose factor, each side also reached differing conclusions leaving open factual disputes. The Airlines argued that the purpose of military leave is to allow employees to pursue parallel careers. By contrast, Clarkson argued the primary purpose of military leave is to perform a civic duty and public service. Finally, regarding the factor of control, there was again conflicting testimony on the flexibility pilots had to resolve scheduling conflicts. The Ninth Circuit denied the Airlines' motion and concluded that the factual disputes were best left to the jury, and not for the court to decide.

The *Clarkson* case serves as an important reminder that when it comes to employee leaves the USERRA only requires an employer to provide a service member equal treatment – not better treatment – but the treatment must indeed be equal. If a service member requests military leave, be sure to compare non-military leaves of similar duration to determine whether to pay the service member for the leave. In addition, be sure to carefully analyze California's military leave statutes, which also require the employer to pay the service member on leave in some instances.

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### **Chapter 3: Employee Discipline**

#### ***Rodgers v. State Personnel Board (Department of Corrections), 83 Cal. App. 5<sup>th</sup> 1 (2022) - State Agency's Skelly Letter Failed To Provide Employee Adequate Notice Of Discipline***

In September 2022, the California Court of Appeal issued an important ruling in *Rodgers* that reaffirmed the importance in providing adequate due process to employees during the *Skelly* process.

One summer evening in 2017, Sergeant Steven Rodgers, a Department of Corrections and Rehabilitation (CDCR) employee, was working an evening “contraband surveillance watch” shift at the Pelican Bay Security Housing Unit (SHU). Contraband surveillance watch is a procedure for monitoring inmates suspected of hiding drugs or weapons inside their body. The inmate is physically restrained and placed in a cell under constant observation until they excrete the contraband, or 72 hours has elapsed. The restraints prevent the inmate from accessing and re-ingesting the contraband before staff can retrieve it. Each watch is divided into shifts that a sergeant supervises. At least twice during the shift, the supervising sergeant is required to help the officer ensure the restraints are secure and comfortable. Pelican Bay's policy states a *preference* that these checks occur at the beginning and end of every shift, though it is not mandatory.

At approximately 10:00 pm that night, correctional officers Angulo and Palafox began their shift and requested Rodgers to conduct the first restraint check. The officers' testimony differs as to what happened next.

Angulo and Palafox said Rodgers allegedly told them he was “too busy” at the time. At approximately 10:30 pm, Palafox again asked Rodgers to do the check, to which Rodgers told Palafox to “pencil whip” (a military term that means to forge or falsify) the form to show the check as completed. Rodgers also allegedly said if anything happened, he’d “take the hit.” The officers then contacted another Sergeant, who contacted Rodgers’ supervisor Lieutenant Vanderhoofven. The officers said they asked Rodgers again at 11:15 pm to conduct the restraint check, at which point he “became irritated” for repeatedly asking him. Around midnight, approximately two hours into the shift, Rodgers conducted the restraint check and discovered one of the inmate’s leg cuffs were not double-locked.

At around 2:00 am, Lt. Vanderhoofven visited the facility to discuss proper procedures with Rodgers after hearing Rodgers was “refusing” to conduct the check. After the Lieutenant left, Rodgers allegedly returned to the watch area and angrily asked the officers, “Which one of you mother f...ers spoke to another sergeant about this?” The next morning at approximately 5:30 am, Sergeant Reynoso arrived to take over as supervising sergeant and the officers asked him to do the check with him. When Rodgers arrived approximately 10 minutes later to do the final check and discovered it had already been completed, he became upset again and said, “What the hell, you trying to have another sergeant do my job?”

Rodgers’ version of events is different. He states he never neglected his duty to perform the restraint checks, but that he was simply too busy to perform the checks at the times the officers repeatedly asked. Rodgers was angry the officers were falsely accusing him of neglecting the restraint checks when Rodgers was imply telling them that he would conduct the checks later.

In May 2018, CDCR served Rodgers with a Notice of Adverse Action (NOAA) stating that his salary would be reduced by 10 percent for two years, effective the end of the month. The NOAA alleged Rodgers: (1) neglected his duties by “refusing to perform” the inspection at the beginning of shift; (2) treated his subordinates in a “discourteous and disrespectful” manner when he angrily, and with profane language, “confronted and intimidated” them about reporting his neglect of duty to another sergeant; and (3) “misused [his] authority” when he directed the officers to “pencil whip” their inspection documentation, thereby “instructing them to fill in inaccurate information regarding the arrest inspections on official records.”

Rodgers requested a hearing. The hearing officer largely credited Rodgers’ testimony over the officers’ testimony. The hearing officer found the allegation that Rodgers had refused to perform a timely restraint check at the beginning of the shift was unsubstantiated because Rodgers repeatedly said he would do the check later because he was tending to other duties. Palafox’s watch form corroborated Rodgers’ testimony that he performed the check approximately 45 minutes into the shift. The hearing officer concluded the document falsification allegation was unsubstantiated because he credited Rodgers’ testimony to “pencil in” the form, not “pencil whip” it.

The only specific allegation the hearing officer upheld was the discourteous confrontation charge. The hearing officer found that Rodgers had been angry and used profanity, but for a different reason than what was alleged in his NOAA. He found Rodgers as angry because



Rodgers believed the officers had falsely accused him for a neglect of duty he had not committed rather than finding Rodgers was angry because the officers had accurately reported misconduct.

Despite upholding only the discourteous confrontation allegation, the hearing officer concluded the full proposed salary reduction of 10% for two years was an appropriate penalty. The State Personnel Board (SPB) upheld the hearing officer's findings, and Rodgers timely challenged the decision in Superior Court via a petition for administrative mandamus. The Superior Court denied Rodgers' challenge and Rodgers appealed.

The Court of Appeal agreed with Rodgers that the SPB decision violated his procedural due process right to notice of the basis for the disciplinary penalty. The Court found that Rodgers was not notified that he was to be disciplined with a 10% reduction in salary for two years based on a single allegation of misconduct. Because the hearing officer found Rodgers engaged in only one of the several charges of misconduct listed in the NOAA, Rodgers lacked appropriate notice that only one charge could subject him to the full penalty proposed.

The Court rejected the SPB's argument that the penalty should be upheld because the hearing officer found that Rodgers's discourteous treatment of the officers was likely to recur and could chill the officers' willingness to report any future misconduct. The Court said the problem is not that charge of discourteous treatment; the problem was with the NOAA's description of the basis for that charge. The NOAA advised that the discourteous treatment charge was premised on an underlying neglect of duty; CDCR claimed Rodgers angrily confronted his subordinates for reporting a refusal to perform the beginning-of-shift inspection, but that is not what the hearing officer found. Instead, the hearing officer found that, having properly discharged his duty to perform the restraint inspection, Rodgers angrily confronted his subordinates because they'd wrongly accused him of shirking his duty.

The Court reiterated that it was not condoning Rodgers' behavior or saying it was not punishable. The hearing officer did find that Rodgers's decision to confront his subordinates with anger and profanity was unprofessional, discourteous, and violated CDCR's policy on treating other employees with respect. But, the issue before the Court was not whether Rodgers' committed any misconduct, it was whether he was on notice that his alleged actions could subject him to the proposed penalty. To answer that question, due process requires the Court to compare the facts alleged, to those found true after an evidentiary hearing. In the NOAA version, Rodgers engaged in grave misconduct that contributed to a culture of silence that fosters corruption. The hearing officer rejected that theory, however, and found Rodgers simply failed to keep his temper in check and treat his subordinates with respect when confronting them over a misunderstanding. Given the significant difference between the two kinds of misconduct, the Court concluded Rodgers lacked notice and his actions could subject him to the imposed penalty. The Court reversed the judgment and directed the trial court to order the SPB to set aside its decision sustaining the disciplinary action.

*Rodgers* underscores the need to prepare a *Skelly* notice with great care. The public agency must not only accurately state the basis for each charge, but be able to prove the basis for each charge. In addition, if the proposed penalty would be appropriate based on any one of

several charges, then the *Skelly* notice should specifically say so and offer a brief explanation as to why.

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***Shouse v. County of Riverside*, 84 Cal.App.5th 1080 (2022, rev. denied 2/1/23) -  
*Unsubstantiated Rumors Do Not Start The One-Year Period For Completing An Internal Investigation***

In *Shouse*, a captain in a sheriff's department challenged his termination by claiming a violation of the Police Officers Bill of Rights Act's (POBRA) one-year statute of limitations for conducting an investigation. The captain in question had been a county employee for approximately 22 years. In around April of 2016, the chief in the captain's chain of command learned of a rumored intimate relationship involving the captain and a female deputy. On May 20, 2016, the chief learned of another alleged relationship between the captain and a second female deputy. A personnel investigation then revealed the captain had maintained multiple sexual relationships with female employees in violation of department policy and general orders.

On June 3, 2016, the captain received written notice that he was the subject of an administrative internal affairs investigation into allegations that he had inappropriate relationships with other department employees/subordinates. A detailed report, dated April 10, 2017, sustained allegations of the captain's improper conduct. That same day, the captain received a notice of intent to terminate, and he was terminated on April 25, 2017. The captain lost his subsequent administrative appeal, and filed a petition for writ in the superior court to overturn his termination. The superior court denied the petition and agreed with the hearing officer's finding that there was sufficient evidence to substantiate the captain's misconduct. The court also found no POBRA violations.

The captain appealed the superior court's ruling. On appeal, the captain alleged only that the Department violated his POBRA rights by failing to complete its internal investigation within one year of the discovery of his improper conduct. The POBRA contains a statute of limitations at Government Code section 3304, which states that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct."

The captain alleged that the chief should have known of his improper conduct earlier because his sexual relationships with subordinates were the subject of the department's "rumor mill." The captain claimed "there were at least a half-dozen supervisors and senior officers who were aware of allegations of misconduct involving [the captain] prior to April 10, 2016, all of whom could have, like [the chief], initiated a complaint inquiry."

The Court of Appeal rejected this argument and held that the POBRA statute of limitations does not begin based on mere rumors, but only after a department determines that actionable misconduct occurred. Here, the captain failed to identify a single individual who was

“authorized to initiate” an investigation or demonstrate that the public agency had determined that discipline should be taken prior to May 2016.

The Court of Appeal declined to “promote a policy of launching into the intimidate relationships of public safety officers on the basis of mere rumors.” The Court noted that an internal affairs investigation can have a devastating impact on the career of a public safety officer, and “should only be initiated when the officer authorized to initiate an investigation knows or has reason to know that the conduct involves actionable misconduct” and not “on the basis of unsubstantiated rumors.”

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***Griego v. City of Barstow, 303 Cal.Rptr.3d 379 (2023) - California Court Of Appeal Gives District Broad Discretion To Discipline A Fire Captain***

*Griego* highlights the various factors public agencies must consider when imposing disciplinary penalties on employees.

Jesse Griego was a captain in the Barstow Fire Protection District for the City of Barstow. He also coached children’s sports teams, including the girls’ softball team at Barstow High School. In 2007, Barstow issued a memorandum to its captains directing personnel not to attend sporting events while on duty. In March 2017, a fire chief verbally reprimanded Griego for coaching while on duty. Griego expressed no regret and was later seen attending a sporting event while on duty. The fire chief thereafter issued Griego a written reprimand.

Also in early 2017, a safety officer at Barstow High School reported she suspected an inappropriate relationship between Griego and a 15-year-old student, H.S. The officer saw Griego bring H.S. lunch during school hours and H.S. drive Griego’s car. She heard students saying that H.S. was wearing Griego’s shirt, the two had adopted a cat together, and they had visited a theme park together.

The Barstow Police Department opened a criminal investigation into Griego’s actions. The City placed Griego on paid administrative leave, and Barstow High School told him to end contact with the girls’ softball team. Nonetheless, Griego continued to attend practices and games and to communicate with coaches and players, including H.S.

Barstow launched an investigation into whether Griego had violated Fire District’s Rules and Regulations regarding grounds for disciplinary action. The City’s investigator sustained 19 allegations against Griego. These allegations included, among others, that Griego: (1) sought an “intimate dating relationship” with minor H.S.; (2) defied specific directions not to coach while on duty despite multiple warnings; (3) carried a concealed handgun outside his home without a permit; and (4) filed a false court document under penalty of perjury. The handgun allegation referred to November 2017, when Griego carried a concealed gun to investigate suspicious people outside his home. A police officer arrived and asked Griego if he had a gun; Griego said yes and showed it to him. The officer asked if Griego had a concealed carry permit; Griego did not. Penal Code section 25400 prohibits carrying a concealed gun in public without a permit.

As for the perjury, in 2017 Griego's ex-wife applied for a domestic violence restraining order against him. A temporary restraining order issued in July 2017 included a direction to store any firearms with the police department or a licensed gun dealer. Yet in August 2017, Griego signed and filed a response that declared, "I do not own or have any guns or firearms." Griego later admitted he had owned guns for about two years. Regarding the false court filing, he said, "I probably didn't even read that and pay attention to that."

The Fire Chief thereafter issued a notice of intent to terminate including an explanation of why Griego's conduct violated the Fire District's personnel policies and prior incidents of discipline. After Griego's *Skelly* meeting, the Fire Chief issued a notice of termination based on 18 of the 19 sustained allegations. Griego appealed his termination through advisory arbitration. The arbitrator concluded there was sufficient evidence to sustain six of the 18 allegations against Griego. The arbitrator found insufficient evidence supported the alleged inappropriate relationship, however, as H.S. and her family testified nothing untoward had happened. The arbitrator advised reducing the penalty to a 30-day suspension.

Per City policy, the City Manager received this advisory opinion and exercised his discretion to amend, modify, or revoke the arbitrator's recommendation. The City Manager disagreed with the arbitrator and concluded the evidence demonstrated Griego indeed had pursued a relationship with H.S. The City Manager also upheld the other charges that the arbitrator had previously upheld and then terminated Griego.

Griego filed a petition for writ of administrative mandate in the Superior Court. The Court found there was sufficient evidence to sustain only three allegations, i.e., coaching on duty, carrying a concealed handgun without a permit, and filing a false court document. The Superior Court held termination was not appropriate based on these three allegations and remanded the matter for reconsideration of Griego's discipline. The City appealed the trial court's decision.

On appeal, the Court of Appeal reviewed the matter to see if the City, abused its discretion. An agency abuses discretion if it does not proceed as required by law, its decision is not supported by the findings, or its findings are not supported by the evidence.

The Court of Appeal held that termination was "well within the City's broad discretion." The Court of Appeal found that the City Manager had connected her decision to three serious, sustained allegations, namely: refusing to follow an express directive, issued multiple times, not to coach softball while on duty; carrying a concealed handgun without a permit; and lying under penalty of perjury about possessing firearms. The Court of Appeal distinguished Griego's case from another precedent in that Griego was "an experienced but defiantly insubordinate supervisor [who set] an intolerable example by repeatedly flouting direct commands from his superior." The Court concluded that the sustained allegations of Griego's misconduct demonstrated a lack of credibility, reliability, and trustworthiness, and were therefore a reasonable basis for the City's decision to sustain termination.

This case highlights that supervisory employees must set a good example for their subordinates, and that insubordination is serious misconduct. In assessing whether a disciplinary

penalty is within an agency’s discretion, the courts will consider harm to public service, circumstances surrounding the misconduct, and likelihood of its recurrence. The court found that the City Manager considered all these factors and imposed an appropriate penalty.

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#### **Chapter 4: Labor Law**

##### ***SEIU Local 1021 v. City and County of San Francisco, PERB Decision 2846-M (2022) - PERB “Harmonizes” Its Test For When An Employer Must Bargain A Managerial Decision With The California Court Of Appeal’s Direction In County Of Sonoma***

In Summer 2021, the City of San Francisco’s Health Officer issued an order requiring employees of businesses and governmental entities who regularly work in high-risk settings to be fully vaccinated against COVID-19 within 10 weeks of the U.S. Food and Drug Administration’s approval of a vaccine. In addition, the City created its own vaccination and face covering policy (Policy) which required all employees to disclose their vaccination status and provide proof of vaccination or proof of eligibility for an exemption. Those exempted were required to submit to COVID-19 testing at least once a week.

SEIU filed an unfair practice charge against the City with the Public Employment Relations Board (PERB or Board) regarding the Policy.

PERB’s Office of the General Counsel (OGC) analyzed SEIU’s charge and allowed SEIU to proceed with only some of its allegations. The allegations the OGC allowed SEIU to pursue included that the City violated the Meyers-Milias-Brown Act (MMBA) by: (1) failing to bargain the negotiable effects of the Policy; (2) requiring employees to sign a form consenting to discipline for failure to comply with the Policy; (3) adding a COVID-19 vaccination requirement to the minimum qualifications in job descriptions without bargaining; (4) unilaterally changing its policy on the religious exemptions to vaccination requirements; and (5) failing to inform SEIU about employees’ applications for exemptions to the Policy.

The OGC dismissed several other of SEIU’s allegations, including that the City violated the MMBA by: (1) unilaterally deciding to adopt the mandatory vaccination Policy; (2) requiring employees to disclose their vaccination status; and (3) refusing to allow employees to submit SEIU-created vaccination forms in lieu of the City’s forms. The OGC determined that the City’s decision to adopt the Policy was a managerial decision that was outside the scope of representation under PERB’s 2021 decision in Regents of UC, and therefore not subject to bargaining. SEIU appealed the OGC’s partial dismissal, and the PERB took up the matter.

The key question before PERB was whether the City’s adoption of the Policy was a management decision outside the scope of representation. The MMBA defines the scope of representation as: “[A]ll matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.”

PERB proceeded carefully in its analysis because the California Court of Appeal had determined only months earlier in *County of Sonoma v. PERB* (2022) 80 Cal.App.5th 167, that PERB had applied the wrong test to evaluate whether a management decision was subject to bargaining.

PERB reviewed several California Supreme Court precedents and harmonized PERB's method of analysis with the California Court of Appeal's analysis in *Sonoma*. First, PERB's test categorizes the type of management decision at issue into one of the following: (1) decisions that have only an indirect and attenuated impact on the employment relationship are not mandatory subjects of bargaining, such as advertising, product design, and financing; (2) decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls are always mandatory subjects of bargaining; and (3) decisions that directly affect employment, such as eliminating jobs, may not be mandatory subjects of bargaining if they involve a change in the scope and direction of the enterprise or the employer's retained freedom to manage its affairs.

Second, if the decision falls within the third category, PERB's test analyzes whether the implementation of the fundamental managerial or policy decision has a "significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." If so, then PERB determines whether "the employer's need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question."

Using its test, PERB then distinguished its 2021 decision in *Regents of the University of California* (2021) PERB Decision No. 2783-H, which held that a mandatory influenza vaccine policy was a managerial decision outside the scope of bargaining. PERB said the OGC had improperly relied upon *Regents* to determine that City's Policy was a managerial decision because SEIU might be able to overcome the holding in *Regents*. PERB directed the OGC to allow SEIU to proceed on the decisional bargaining allegations.

PERB next examined the OGC's decision to dismiss SEIU's allegation that required employees to disclose "their vaccination status under penalty of perjury" The OGC had dismissed this allegation on the grounds that PERB does not enforce laws governing employees' privacy; and questions about employees' vaccination status do not implicate employees' MMBA rights. The Board agreed with SEIU that the OGC should have reviewed this allegation as a unilateral change. Because the City had never required employees to disclose their vaccination status until after the Policy was implemented, PERB found the Policy fell within the "newly created policy" category of unlawful unilateral change.

Finally, PERB analyzed SEIU's claim that the City's decision to require employees to disclose their vaccination status constituted unlawful direct dealing with employees. In general, an employer violates the duty to bargain in good faith if it directly approaches employees to effect a change in terms or conditions of employment within the scope of representation. Further, an employer may not communicate directly with employees to undermine a union's exclusive authority to represent unit members. PERB held that SEIU's charge did not contain any allegations regarding direct dealing, and upheld the OGC's dismissal of that claim.

PERB remanded the case to the OGC to issue an amended complaint that was consistent with its decision.

Going forward, public employers should follow the test that PERB has outlined in this case for determining whether it must bargain a managerial decision and/or its effect.

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## **Chapter 5: Retirement Law**

### ***CalPERS Circular Letter 200-014-23- Requires Agencies Provide More Information to Support Decisions on Local Safety Members' Disability Retirements***

On March 15, 2023, CalPERS issued Circular Letter 200-014-23, setting forth new requirements that contracting agencies must follow when determining whether local safety members are substantially incapacitated from performance of their usual duties for the purposes of a disability retirement. Specifically, under Circular Letter 200-014-23, agencies are now required to submit additional documentation and information to CalPERS, including several newly created CalPERS forms, when certifying an application for disability retirement, industrial disability retirement, and re-evaluation for continuous eligibility for disability retirement.

For example, agencies must complete a form detailing how often the member performs various physical activities, such as interacting with others, lifting certain weights, sitting, standing, kneeling, and climbing in the course of their employment. The form also requires agencies to indicate if the member has been through the reasonable accommodation process, and if so, requires the agency to submit the reasonable accommodation documentation to CalPERS.

Agencies also must now submit a form (signed by a physician) that includes the physician's findings and diagnosis and answers specific questions regarding whether the member is substantially incapacitated. If the member is found substantially incapacitated, the physician must list the specific job duties the member is unable to perform due to incapacity, and whether the incapacity is permanent or will last longer than 12 months. The Circular Letter lists other newly required CalPERS forms as well.

Although it is not yet clear how CalPERS intends to use the additional information, CalPERS appears to require this additional information to more closely scrutinize contracting agencies' decisions regarding local safety members' disability retirement and industrial disability retirement applications. For example, many agencies rely solely on workers' compensation reports, which may contain presumptions or prophylactic work restrictions that are inapplicable under the Public Employees' Retirement Law. Government Code section 21154 provides that contracting agencies, rather than CalPERS, are responsible for determining whether local safety members (other than school safety members) are incapacitated from their duties. It is uncertain if these new requirements will change who decides whether an application is granted or how applications are processed. However, agencies will have to provide additional documentation to CalPERS supporting the underlying application and may have to obtain more independent medical examinations as a result of the changes.

## **Chapter 6: “Eye to the Future”: Pending California Supreme Court Decisions and California Legislation**

The following chapter touches on some of the relevant California Supreme Court decisions and legislation that may have a significant impact on labor and employment laws in the public sector. While the outcome of these future appellate decisions and proposed legislation may ultimately be different than where they stand now, these cases raise some important issues we believe agencies should keep an eye on in the foreseeable future.

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### ***Bailey v. San Francisco District Attorney’s Office, George Gascon, City & County of San Francisco, S265223 - City Took Appropriate Corrective Action Responding to Employee’s Complaint Involving Racial Epithet Used By Coworker***

*Bailey* is a pending California Supreme Court case that is on review from an unpublished decision of the First District Court of Appeal. While the underlying Court of Appeal decision is not citeable, the Supreme Court’s decision in *Bailey* may significantly impact how employers should handle discrimination complaints from co-workers to avoid liability under FEHA.

Twanda Bailey worked as an Investigation Assistant for the City of San Francisco. Baily worked next to Saras Larkin, another investigative assistant in the records room. Twanda claims that in January 2015, after a mouse ran through the records room and startled her, Larkin said “You n...ers is so scary.” Bailey was very offended and left the records room to calm down. Outside she told three co-workers about the incident but did not report it to the human resources office because she feared retaliation since Larkin had a close relationship with the HR Director.

The next day, Bailey’s supervisor overheard a conversation about the incident and asked Bailey if she reported it. When Bailey said she had not, Lopes said she would notify HR. A few days later the incident ended up being reported from the Assistant Chief of Finance, to the Chief Administrative and Financial Officer, who in turn reported directly to the District Attorney.

The Assistant Chief of Finance took Bailey’s statement and met with the HR Director and Larkin, who denied making the remark. The Assistant Chief of Finance reminded her that the word was not acceptable in the workplace.

Two months later, Bailey asked the HR Director for a copy of the report that she thought was prepared for the incident. The HR Director told her no report was prepared, and Bailey said she wanted a complaint filed, but the HR Director refused. The HR Director also told Bailey that if she discussed the incident with others, she would be creating a hostile work environment for Larkin. Bailey then went on a leave for a few weeks.

In April, Bailey received a letter from the HR department stating it had received notice of the incident and would be reviewing it. A San Francisco Police Department employee who had heard of the incident had notified the Department.



When Bailey returned from leave she claimed the HR Director treated her differently, made faces at her, and refused to speak to her. She later learned that the HR Director had vetoed separating Bailey and Larkin at work. She also felt that she was performing tasks outside her job description that were normally Larkin's. Bailey's supervisor perceived that she seemed annoyed and irritated by work requests they considered standard.

A couple months later, the HR Department notified Bailey it would not investigate the complaint because the "allegations are insufficient to raise an inference of harassment/ hostile work environment or retaliation."

Bailey later went on a six-week medical leave. She subsequently filed a lawsuit alleging causes of action under the FEHA for racial discrimination and harassment, for retaliation for having made a complaint, and for failure to prevent discrimination/harassment/retaliation.

The trial court held that "no reasonable trier of fact could reach [the] conclusion" "that her co-worker's single statement... without any other race-related allegations, amounted to severe or pervasive harassment." On appeal, the Court of Appeal explained that Bailey correctly asserted that a single racial epithet can be so offensive it gives rise to a triable issue of actionable harassment. The existence of a hostile work environment depends upon the totality of the circumstances, and a discriminatory remark may be relevant, circumstantial evidence of discrimination.

The Court of Appeal then focused on whether the single alleged racial epithet, in context, was so egregious in import and consequence as to be "sufficiently severe or pervasive as to alter the conditions of Bailey' employment. The court reasoned that precedent has similarly commented on the significant difference between a slur by a co-worker and one by a supervisor. Bailey failed to cite to any case that held that an egregious, racial epithet by a co-coworker, without more, created a legally cognizable hostile work environment. Bailey also did not make any factual showing that the conditions of her employment were so altered by the one slur by her coworker as to constitute actionable harassment. Thus, the Court of Appeal agreed with the trial court's decision that without any other race-related allegations, the co-worker's single statement did not amount to severe or pervasive racial harassment.

The Court further disagreed with Bailey's allegation that the District Attorney's Office and City failed to take appropriate corrective action. The City informed Larkin that the use of the epithet was unacceptable, and gave her a written copy of the City's Harassment-Free Workplace Policy. Larkin was required to meet with the Assistant Chief of Finance, Chief Administrative and Financial Officer who required Larkin to acknowledge the anti-harassment policy, which was placed in her personnel file. Given these facts, the Court of Appeal held that the remedial action by the DA's Office and City was sufficient.

As for her retaliation claim, Bailey alleged the City retaliated against her for reporting Larkin's racial slur as evidenced by the HR Director's "course of conduct" and on comments made by her new supervisor on her June 2015 performance review. The Court of Appeal explained that the HR Director's conduct and response to Bailey's complaints did not rise to the level of a legally cognizable adverse employment action. Bailey's assertion that she suffered

emotionally from Larkin's alleged racial slur which affected her performance, in turn resulting in improvement comments on her performance review, is not an assertion that her supervisor retaliated against her for complaining about Larkin's alleged slur. Additionally, the supervisor gave her the same overall rating, "Met expectations" that Bailey had received each of the prior two years. Thus, the Court of Appeal agreed with the trial court that the neither the HR Director's "course of conduct" nor improvement comments on Bailey's review rose to the level of an adverse employment action.

Bailey appealed and her case was selected for hearing by the California Supreme Court. The case is one to watch given the issue of whether a single racial epithet can create a hostile work environment is at issue.

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***Garcia-Brower v. Kolla's Inc., S269456 - Employee Terminated for Reporting Entitled Wages to Employer Did Not Amount to a Public Disclosure as Required Under California's Whistleblower Statute***

*Garcia-Brower v. Kolla's Inc.* is another retaliation case pending before the California Supreme Court, and at issue is whether the California's whistleblower statute, Labor Code section 1102.5, subdivision (b), protects an employee from retaliation for disclosing unlawful activity when the information the employee is disclosing is already known to the person or agency. The underlying Court of Appeal decision is unpublished and not citeable pending Supreme Court review.

The plaintiff was employed as a bartender at Kolla's Night Club, in Lake Forest. On or about April 5, 2014, the plaintiff told Kolla's owner and operator, Gonzalo Sanalla Estrada, that she had not been paid wages for her previous three shifts. Estrada responded by threatening to report her to "immigration authorities," terminated her employment immediately and told her never to return.

On June 2, 2014, an employee filed a complaint with the Division of Labor Standards Enforcement (DLSE) and DLSE undertook an investigation. The investigation revealed Estrada was upset at the employee complainant for challenging him about her wages, threatened her and terminated her because she had complained. The DLSE determined respondents violated Labor Code sections 98.6, 244, 1019, and 1102.5 and ordered them to pay the complaint lost wages and civil penalties.

In October of 2017, the Labor Commissioner filed an enforcement action against both Estrada and Kolla's alleging violation of statutory provisions. The trial court determined the Labor Commissioner did not state a claim under section 1102.5, which prohibits an employer from retaliating against an employee for "disclosing a violation of state or federal regulation to a governmental or law enforcement agency". The trial court found there could be no violation here since the complainant contacted the DLSE after her termination. On appeal, the Court of Appeal upheld the trial court's judgment on section 1102.5 claim, but reversed the judgment as to the section 98.6 claim against Kolla's.

The Court of Appeal reasoned that the Labor Commissioner was correct because under the amended statute reporting a violation to Estrada instead of a government agency would be sufficient. The Court then focused on whether the Labor Commissioner adequately alleged protected activity by the complainant. However, an important element of the 1102.5 claim was missing in regarding “disclosing” or “providing information to, or testifying before, any public body.”

The Court of Appeal explained that nowhere in the complaint did the Labor Commissioner specifically allege the complainant “disclosed” the fact of her unpaid wages to Estrada. In fact, the allegations suggest that Estrada was at least aware of, if not responsible for, the non-payment of wages. The Court emphasized the legislative intent in choosing the term “disclose” rather than “report.” Estrada’s state of awareness in the Court of Appeal’s view was absolutely necessary to establish a violation of section 1102.5.

On the Labor’s Commissioner’s retaliation claim under section 98.6, the Court held that the Complainant’s conduct was protected by the statute since she was complaining about unpaid wages, and it is a crime for an employer to willfully refuse to pay agreed-upon wages. The Court further explained that Kolla’s violated the statute twice, by threatening to report her to immigration, then firing her.

The case is now pending review by the California Supreme Court.

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### **III. LEGISLATION**

We are highlighting a few bills that have been introduced that could significantly impact California employers if they become law and should be on an agency’s radar. Some or all of these bills could undergo substantial amendment as they work their way through the Legislature, or they might not be passed at all, but we are highlighting them for you here so your agencies can track them.

#### ***Assembly Bill 524 – FEHA Protection for Family Caregivers***

Assembly Bill 524 (AB 524) would add “family caregiver status” to the list of protected classifications enumerated in the Fair Employment and Housing Act (FEHA), which also includes race, sex, sexual orientation, and others.

Specifically, AB 524 would amend the FEHA to prohibit discrimination and harassment against an employee on the basis of their “family caregiver status,” meaning their status as “a person who is a contributor to the care of one more family members.”

The bill defines the term “family member” broadly to include an employee’s spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or “any other individual related by blood or whose association with the employee is the equivalent of a family relationship.”

### ***Assembly Bill 518 – Expansion of Paid Family Leave***

Currently, employees who pay into the Unemployment Compensation Disability Fund may receive up to 8 weeks of wage replacement benefits in order to take time off work to care for a seriously ill family member, meaning the employee’s child, spouse, parent, grandparent, grandchild, sibling, or domestic partner.

Assembly Bill 518 (AB 518) would amend the Unemployment Insurance Code to expand the definition of “family member” to include any “individual related by blood or whose association with the employee is the equivalent of a family relationship.”

This bill follows recent legislation, which took effect on January 1, 2023, that expanded the California Family Rights Act to allow eligible employees to take leave to care for a “designated person,” meaning “any individual related by blood or whose association with the employee is the equivalent of a family relationship.” The same legislation also allows employees to take paid sick leave pursuant to the California Paid Sick Leave Law to care for a “designated person,” which means a person identified by the employee at the time the employee requests paid sick days.

### ***Senate Bill 731 – Remote Work as a Reasonable Accommodation***

Senate Bill 731 (SB 731) would amend the FEHA to authorize an employee with a qualifying disability to initiate a renewed reasonable accommodation request to perform their work remotely if certain requirements are met.

Under SB 731, a “qualifying disability” means “an employee’s medical provider has determined that the employee has a disability that significantly impacts the employee’s ability to work outside their home.” If an employee who has such a qualifying disability renews a previous request to work remotely, the employer would be required to grant that request if all of the following requirements are satisfied: (1) the employee requested and was denied remote work as a reasonable accommodation before March 1, 2020; (2) the employee performed the essential functions of their job remotely for at least 6 of the 24 months preceding the renewed request; and (3) the employee’s essential job functions have not changed since the employee performed their work remotely. However, the employer is not required to provide remote work as a reasonable accommodation if the employee can no longer perform all of their essential job functions remotely.

SB 731, if enacted, would be a significant departure from the standard interactive process in which employers engage with employees seeking a reasonable accommodation. Employers are currently not obligated to choose any particular accommodation or the accommodation preferred by the employee.