



# Labor Employment and Litigation Update

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# Labor and Employment Litigation Update

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# Labor and Employment Litigation Update Spring 2024

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## 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 and legislation discussed in this paper cover a wide range of employment issues that public agencies commonly face. Amongst these decisions and legislation, we saw several cases brought by employees alleging discrimination, employers disciplining employees, cases and legislation related to the evolving California Public Records Act including Senate Bill 400 which expands law enforcement transparency obligations, and significant cases concerning Workers Compensation and employee retirement. We also saw several federal appellate rulings from jurisdictions other than the Ninth Circuit that provide a helpful lens for how a court here might approach a First Amendment retaliation challenge, concerning police officers speaking on alleged matters of public concern. In 2023, the California Legislature also passed Senate Bill 553, which will require employers to have a Workplace Violence Prevention Plan in place by July 1, 2024.

In addition, the past six months brought several cases resulting in significant new analysis of Labor Law claims. These cases highlighted how employers should treat protected union activity by employees, as well as when employers can prevail on claims of retaliation in response to employee discipline.

The next section includes cases with key developments in labor and employment law. We broke down these cases into three categories: (1) The California Public Records Act; (2) Employee Discrimination and Discipline cases; (3) Workers Compensation and Retirement cases; (4) Workplace Violence Prevention Plan legislation; (5) Labor Law cases; and (6) First Amendment cases.

## II. CASES AND LEGISLATION

### Chapter 1: The California Public Records Act

#### *Castañares v. Superior Court (City of Chula Vista), 98 Cal.App.5th 295 (2023) (Petition for review filed 2/1/24) – Some Law Enforcement Drone Videos May Qualify For the CPRA’s Investigation or Catchall Exemptions*

The City of Chula Vista operated a pilot program using police drones to respond to 911 calls. The drones gave officers and commanders important preliminary information about what they would encounter on scene. Arturo Castañares, a journalist and private pilot, submitted a California Public Records Act (CPRA) request seeking: (1) access to and copies of video footage from all [Chula Vista Police Department] (PD) drone flights conducted between March 1 and March 31, 2021; (2) documents related to the retention, access, costs and custody of such videos. However, Castañares qualified his request by asking the City to redact any such videos that may be part of any ongoing or pending investigations, but to provide a log of any videos or documents withheld, who made the determination to withhold them, and when they may be released. In addition, Castañares asked for documents “related to any preplanning, flight plans, mapping, or other information used to organize, operate, and monitor [the drone] flights.”

The City provided “a timely partial response” informing Castañares that responsive information could be found on the City's website, and the requested video footage was exempt under the investigatory records exemption per Government Code section 7923.600, subdivision (a). Castañares filed a lawsuit against the City for declaratory and injunctive relief, requesting a judicial declaration that the City did not comply with the CPRA, a writ of mandate directing the City to comply with the CPRA, and an injunction to require the City to allow Castañares to inspect and obtain copies of all responsive records to his CPRA request.

After limited discovery at a preliminary hearing, the only remaining issue was whether the City had to provide the drone video footage. After the court heard oral argument, it issued a minute order finding in favor of the City. The court acknowledged that this was an issue of first review.

The CPRA gives every person a presumptive right to inspect any public record, except those that the law expressly exempts from disclosure. Most relevant here is that the CPRA exempts from disclosure certain records of police investigations. (Gov. Code section 7923.600(a).) Also, the catchall CPRA exemption allows a government agency to withhold records if it can demonstrate that the public interest served by withholding specific records clearly outweighs the public interest served by disclosure.

The trial court concluded that the videos sought were categorically exempt under the investigations exception. Additionally, the City submitted a declaration that it would take approximately 1,800 hours, or approximately 229 workdays, to redact the footage alone, not including the additional legal review, research, and quality control necessary to evaluate privacy, safety, and legal concerns. Therefore, the trial court determined that the request sought to impose

an unreasonable burden on the City resources, with no substantial countervailing benefit given the wealth of information the City had already turned over to the petitioner. Castañares appealed.

The Court of Appeal overruled the trial court on both counts. The Court found that the trial court improperly treated the videos as categorically exempt investigation records. The Court explained that the trial court could require the City to separate the videos into three categories. The first category would be video footage that is part of an investigatory file. This footage would be exempt under the investigations exemption. The second category would be videos that were not included in an investigation file but were instead used to investigate whether a law was violated. The Court noted that these records may still be exempt, as long as law enforcement was reasonably contemplated. The last category would consist of videos that did not fall into the other two categories. This footage would likely consist of instances where a drone was used to make a factual inquiry to determine what kind of assistance may be required, as opposed to investigating a suspected violation of law. According to the Court, video footage used for a factual inquiry, without a suspected violation of law, would not qualify under the investigation exemption, but might qualify under the catchall exemption. However, the Court also found that there was not enough information in the record to determine if the catchall exemption applied. The Court remanded the case to the trial court to conduct further proceedings. The Court did not foreclose the possibility that the records could all be exempt if the City further developed the evidentiary record.

The City filed a petition for review by the California Supreme Court. Until the case is accepted for review, the *Castañares* case remains a published decision and is a helpful reminder that courts will seek to apply CPRA exemptions narrowly and that employers cannot avoid legal challenge by treating records as categorically exempt. Rather, the employer must conduct an in depth analysis as to each record to determine if it qualifies for the exemption.

***Senate Bill 400 – Law Enforcement agencies may, but are not required to, release statements announcing terminations of police and custody officers.***

On February 29, 2024, Governor Newsom signed into law Senate Bill 400 (SB 400). SB 400 amends the California Public Records Act (CPRA) to explicitly allow law enforcement agencies to release statements announcing terminations of police officers and custody officers.

Historically, under Penal Code section 832.7, personnel records of peace officers and custodial officers were deemed confidential and not subject to public inspection under the CPRA. In 2019, the law was amended to grant public access through public records requests related to officer involved shootings, use of force incidents resulting in death or serious injuries, or where there are sustained findings of dishonesty or sexual assault.

This bill further amends Penal Code section 832.7 to clarify that the Code expressly permits, but does not mandate, that employing law enforcement agencies may disclose peace officer terminations for cause and the supporting reasons for the termination. The disclosure is at the agency's discretion, and the supporting reasons may include, but are not limited to the types

of specific conduct outlined in Penal Code section 832.7(b)(1)(A) – (E) (referring to officer involved shootings, use of force incidents involving death or serious injuries or where there are sustained findings of dishonesty or sexual assault).

The bill passed both the Assembly and Senate unanimously. The bill’s passage indicates that the Legislature continues to lean towards increasing transparency with respect to officer misconduct.

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## **Chapter 2: Employee Discrimination and Discipline**

### ***Raines v. U.S. Healthworks, 15 Cal.5th 268 (2023) – The California Supreme Court Significantly Expands the Liability of an Employer’s Agents***

In *Raines v. U.S. Healthworks*, the California Supreme Court held that a business entity acting as an agent on behalf of an employer may be held liable for employment discrimination under the Fair Employment and Housing Act (FEHA). However, the business entity agent must have at least five employees, and can bear direct FEHA liability only when it carries out FEHA-regulated activities on behalf of the employer.

Government Code Section 12940 of the FEHA makes it an “unlawful employment practice” for an employer of five or more persons “to make any medical or psychological inquiry of an applicant.” The FEHA only allows these inquires “after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.”

Kristina Raines and Darrick Figg (Plaintiffs) received offers of employment conditioned on successful completion of pre-employment medical screenings to be conducted by the U.S. Healthworks Medical Group (USHW), who was acting as an agent of the Plaintiffs’ prospective employers. As part of the medical screenings, USHW required job applicants to complete a written health history questionnaire that included numerous health-related questions that the Plaintiffs’ claim had no bearing on their ability to perform job-related functions. Applicants were required to answer whether they had ever had: 1) venereal disease; 2) painful or irregular vaginal discharge or pain; 3) problems with menstrual periods; 4) irregular menstrual period; 5) penile discharge, prostate problems, genital pain or masses; 6) cancer; 7) mental illness; 8) HIV; 9) permanent disabilities; 10) painful/frequent urination; 11) hair loss; 12) hemorrhoids; 13) diarrhea; 14) black stool; 15) constipation; 16) tumors; 17) organ transplant; 18) stroke; or 19) a history of tobacco or alcohol use. In addition, the questionnaire asked whether the applicant was pregnant, sought information regarding medications taken, and required the applicant to disclose prior job-related injuries and illnesses.

After receiving offers from different employers conditioned on passing USHW’s pre-employment screening, each Plaintiff attended their screening. Raines responded to most of the questions on the written questionnaire but declined to answer the question about the date of her

last menstrual period. Raines alleges that USHW then terminated the exam, and her potential employer revoked its offer of employment. Figg answered all the questions, successfully passed the screening, and was hired for the position.

Raines sued both her potential employer and USHW, and later added additional defendants and class claims. The Defendants removed to federal court, where Raines added Figg as a named plaintiff and dismissed her potential employer as a defendant. Filing a third amended complaint, the Plaintiffs alleged FEHA violations, among other causes of action. The District Court granted USHW's motion to dismiss the FEHA claims, concluding that the FEHA does not impose liability on the agents of a plaintiff's employer. Plaintiffs then appealed the dismissal of their other claims. After oral argument, the Ninth Circuit asked the Supreme Court to decide whether FEHA imposes liability on the agents of an employer.

The Supreme Court answered affirmatively. The Court first looked at FEHA's plain meaning and legislative history. Government Code section 12926, subdivision (d), states that the term "[e]mployer includes...any person acting as an agent of an employer, directly or indirectly..." Thus, the Court reasoned that any person [or entity] acting as an agent of an employer is itself an employer. Turning to the legislative history of the FEHA, the Court found that, as a successor to the Fair Employment Practices Act (FEPA) the term "employer" would likely have the same definition in both acts. The FEPA had adopted an agent-inclusive definition of "employer" from the National Labor Relations Act and National Labor Relations Board. Therefore, the Court reasoned that when the legislature adopted the language when drafting the FEHA, they intended the term "employer" to be agent-inclusive as well.

Finally, the Court looked to other judicial interpretations of federal antidiscrimination laws and public policy, and found they generally support the conclusion that an employer's business-entity agents that have at least five employees and that *carry out FEHA-regulated activities on behalf of an employer* can fall within FEHA's definition of "employer" and may be directly liable for FEHA violations.

The Court specifically stated that it was not deciding the significance of any employer control over the agent's acts that gave rise to the FEHA violation, nor whether its decision applied to business-entity agents with fewer than five employees.

The *Raines* case demonstrates that third party businesses may be held liable under the FEHA when they perform services to applicants/employees on behalf of the employer. \

***Jones v. Riot Hospitality Group LLC, 95 F.4th 730 (9th Cir. 2024) – Terminating Sanctions Were Proper in an Employment Discrimination Case Where Ample Circumstantial Evidence Showed That The Plaintiff Deleted and Hid Text Messages With Witnesses, Intentionally Spoliating Electronic Evidence***

Alyssa Jones worked as a waitress at a Scottsdale bar. In 2017, Jones sued the bar's owner-operator and his company, Riot Hospitality Group (collectively "Riot") in District Court, alleging Title VII violations (among other claims). During discovery, Riot obtained text messages

exchanged between Jones, her friends, and co-workers between December 2015 and October 2018. Riot identified instances where Jones appeared to have abruptly stopped communicating with people she had been messaging almost daily. In response to a subpoena, Jones' third-party imaging vendor produced a spreadsheet showing that messages between Jones and her co-workers had been deleted from Jones' mobile phone.

In subsequent depositions, two of the co-workers, both of whom Jones had identified as prospective trial witnesses, testified that they had exchanged text messages with Jones about the case since October 2018. After Jones failed to comply with the District Court's order to produce those messages, the Court ordered the parties to jointly retain a third-party forensic search specialist to review the phones of Jones and three prospective witnesses.

The third-party forensic specialist extracted messages and sent them to Jones' counsel but the lawyer failed to forward any to Riot, despite multiple District Court orders that he do so and several deadline extensions. The District Court then ordered the forensic specialist to send all non-privileged messages directly to Riot and later assessed \$69,576 in fees and costs against Jones and his attorney.

After finally receiving the text messages, Riot moved for terminating sanctions under Federal Rule of Civil Procedure 37(e)(2) regarding the failure to preserve electronically stored information. Riot submitted an expert report from the forensic specialist, who concluded, after comparing the volume of messages sent and received between phone pairs, that "an orchestrated effort to delete and/or hide evidence subject to the Court's order has occurred."

In 2022, the District Court, dismissed the case with prejudice, finding that Jones deleted text messages and cooperated in the deletion of messages by her witnesses, intending to deprive Riot of their use in litigation. Jones and her attorney appealed. On appeal, Jones argued that the District Court abused its discretion by dismissing her case because her conduct was neither willful nor prejudicial to Riot.

The Ninth Circuit affirmed the District Court's ruling. The Court ruled that in order to dismiss a case under Rule 37(e)(2), a district court need only find that the rule's prerequisites are met. These prerequisites are that electronically stored information ("ESI") that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery. After that, the Court looks to whether the spoliating party acted with the intent required under Rule 37(e)(2), and whether lesser sanctions are insufficient to address the loss of the ESI.

While Rule 37(e)(2) does not explicitly define "intent," the word is most naturally understood as involving the willful destruction of evidence with the purpose of avoiding its discovery by an adverse party. Because intent can rarely be shown directly, a district court may consider circumstantial evidence in determining whether a party acted with the intent required



for Rule 37(e)(2) sanctions. Relevant considerations include the timing of destruction, affirmative steps taken to delete evidence, and selective preservation.

The Ninth Circuit found ample circumstantial evidence that Jones intentionally destroyed a significant number of text messages and collaborated with others to do so. Jones could not explain why messages to other employees at the bar were selectively deleted in 2017 and 2018. With respect to the 2019 and 2020 messages, the District Court pointed out that while much of the content of the deleted messages is unknowable, a screenshot of a message sent by a witness to Jones but missing from Jones' phone in its original form, showed that Plaintiff deleted at least one message that had a direct bearing on her case. Moreover, Jones and one of the witnesses obtained new phones shortly after they were ordered to hand over their devices for imaging. Neither Jones nor the witnesses produced the earlier phones for imaging, effectively preventing discovery of messages deleted from those phones.

The Ninth Circuit rejected Jones' arguments that her production of thousands of text messages negated the intent and prejudice elements of Rule 37(e), finding that production of *some evidence* does not excuse *destruction of other relevant evidence*, and evidence from Jones' third-party imaging vendor suggested that she deleted some messages from the very periods covered by her productions. Finally, the Court explained that Rule 37(e)(2) does not require a finding of prejudice as a prerequisite to sanctions, including dismissal. The Court relied on the Advisory Committee Notes to the rule and concluded that the required finding of intent can support an inference that the lost information was unfavorable to the party that intentionally destroyed it, and also an inference that the opposing party was prejudiced by the loss of information that would have favored its position.

The Ninth Circuit found that the District Court's discovery orders instructing the plaintiff and others to hand over their phones to a forensic search specialist were procedurally proper, and Plaintiff's challenge to the orders based on privacy interests was unpersuasive.

The *Jones* case provides a crucial reminder that spoliation of evidence can have significant adverse consequences and attorneys need to exercise due diligence to preserve electronic evidence early on in a litigation.

***Martin v. Board of Trustees of California State University, 97 Cal.App.5th 149 (2023) – A University Had a Legitimate Reason to Terminate a Department Director When the Director Harassed and Retaliated Against Other Department Employees, Creating a Hostile Work Environment***

In 2014, California State University (CSU) hired Jorge Martin as the director of university communications at CSU Northridge's Marketing and Communications Department.

In March 2016, a CSU employee whom Martin supervised filed a complaint with CSU's Equity and Diversity Department (E&D) against Martin. The complaint alleged racial discrimination, harassment, and retaliation. After conducting an investigation, E&D concluded that Martin did not violate CSU policies.

In fall 2016, Martin supervised a temporary employee, who filed a second complaint with E&D, alleging that Martin harassed and discriminated against her based on her sexual orientation. This employee complained that Martin made a suggestive comment to a coworker and complained that Martin wanted to exclude LGBTQ-related content from CSU's weekly publication.

E&D's second investigation found that Martin did not discriminate against or harass this second employee, however, Martin did create a hostile work environment when considering the actions taken in totality. In response, Martin was issued a Memorandum of Counseling, ordered to complete sensitivity training, and ordered to attend management coaching sessions with Human Resources.

In October 2017, a third employee came forward with a complaint against Martin, alleging harassment based on inappropriate comments and retaliation for this employee participating in the second investigation. E&D found that Martin did not violate University policy with respect to the third complaint, but noted that Martin's conduct fell below the standard reasonably expected of any employee, particularly one in a leadership position.

In May 2018, Martin spoke to a subordinate about newspaper articles published about him and the various investigations, telling the subordinate that the finding of hostile work environment was "highly questionable," and that the investigations were biased against him. This employee said Martin seemed very angry with the complainants and asked the subordinate if she was on his side about 10 times.

In June 2018, CSU terminated Martin. Martin's supervisor brought notes to the meeting and offered comments to Martin verbally. CSU's termination letter did not specify the basis for Martin's termination.

On August 16, 2018, Martin filed a complaint against CSU alleging gender, race, color, and sexual orientation discrimination under the Fair Employment and Housing Act (FEHA); race, gender, and sexual orientation harassment; and failure to prevent harassment and discrimination. Martin claimed he experienced discrimination and harassment because he is a middle-aged, light-skinned, Mexican-American, heterosexual, and cisgender male. As to his harassment claim, Martin alleged that "Defendant CSU created a hostile work environment and subjected Plaintiff to unwanted harassment on the basis of his race and sex/gender from May 2, 2018 until his termination on June 6, 2018." On August 1, 2019, CSU filed a motion for summary judgment or summary adjudication. The trial court entered the order granting summary judgment on October 28, 2019. Martin appealed.

The Court of Appeal determined that the trial court correctly granted summary judgment on Martin's discrimination claims. Under the FEHA burden shifting approach, the Appellate Court found that CSU established a legitimate reason for terminating Martin, given the results of the various investigations. The Court rejected Martin's argument that CSU did not provide a consistent basis for terminating him. Further, Martin could not establish that CSU's internal investigation was pretextual or biased against him.

Next, the Court of Appeal affirmed the trial courts grant of summary judgment on Martin's harassment claims, finding that the newspaper articles and CSU's response to the articles did not qualify as harassment. The Court rejected Martin's argument that the hashtag "#comeatmebro" in one the newspaper articles about him was gender harassment based on him being male. The Court found that the gender-based nature of the hashtag was ambiguous, and was part of a series of neutral or anti-sexual harassment hashtags (#MatadorForLife #CSUN #MeTooHigherEd #TimesUp #NotAnymore #YesAllWomen #HarassmentsStupid #TryMe #ComeAtMeBro #FeelingHellaGood) and thus was not sufficiently severe or pervasive to constitute gender harassment. Further, the article did not mention Martin by name. Finding that Martin was not harassed, the Court ruled that the trial court correctly granted summary judgment on Martin's failure to prevent harassment and discrimination claims.

This case demonstrates how important it is for agencies to conduct thorough internal investigations and document legitimate business reasons to support any adverse actions taken.

***Jackson v. Board of Civil Service Commissioners of the City of Los Angeles, 99 Cal.App.5th 648 (2024) – Detention Officer's Disciplinary Appeal Was Premature***

In 2018, Nathan Jackson worked as a detention officer for the Los Angeles Police Department (Department). Jackson was absent from work starting in late February of that year, and was scheduled to return on March 18. On March 18, Jackson missed 6:00 a.m. roll call. He arrived at 7:35 a.m., apologized to the sergeant on duty, and attempted to start his shift. The sergeant noticed that Jackson was slurring his speech, had difficulty communicating and was shaking. Jackson was not in full uniform, wearing a visibly dirty undershirt and not wearing his work boots. The sergeant asked Jackson if he had submitted a doctor's note to the appropriate coordinator, which had been requested during Jackson's absence. Jackson said that he had not, but that he had the doctor's note in his car or in a bag. Jackson left the facility without informing anyone and did not return.

A few hours later, the sergeant went to Jackson's home. Jackson answered the door and gave him a note excusing him from work that day. The note, however, was time-stamped 9:12 a.m. that day, which was an hour and a half after Jackson showed up for work. Jackson returned to work the following day.

At some point the City of Los Angeles (City) signed a “Non-occupational Sick, Revisit, or Injury Report” certifying Jackson was off duty from February 26, 2018 to March 18, 2018. On March 23, 2018 Jackson submitted a request under the Family and Medical Leave Act (FMLA) for intermittent medical leave, backdating the request to January 25, 2018, and seeking approval for leave until July 24, 2018. The City approved the request.

In February 2019, the City served Jackson with notice of a proposed 10-day suspension and supporting investigative materials. The notice included four counts against Jackson, all arising from the March 18, 2018 incident, including: reporting late for duty (count 1); reporting “unfit for duty” (count 2); leaving his post “without authorization” (count 3); and “refusing to provide a doctor's note as directed” (count 4).

The notice informed Jackson that he had until March 20, 2019 to respond to the charges. Jackson did not respond. On May 6, 2019 the City served Jackson with its final notice of the 10-day suspension.

Jackson appealed to the Board of Civil Service Commissioners (Board). The Board upheld the suspension and sustained each count. Jackson then filed a petition for writ of administrative mandate in superior court alleging *Skelly* violations and seeking to have his suspension set aside and backpay awarded. The superior court found that the evidence supported all but one of the charges and vacated the suspension and ordered the Board to reconsider whether Jackson’s actions warranted discipline under its internal policies based on his permissible disciplinary history. The court entered judgment granting the petition in part and issued a writ of mandate. Jackson immediately appealed.

The California Court of Appeal dismissed the appeal, finding that it was premature. The Court reasoned that the trial court’s order was not a “final appealable judgment.” Because the trial court ordered the Board to reconsider its findings, further appeal rights would be triggered if the Board imposed different discipline or declined to award Jackson any backpay. Also, Jackson could file a new or supplemental petition for writ of mandate based on the Board’s new decision, and if Jackson was still dissatisfied, he could appeal from that judgment. To allow the appeal to proceed now would result in an inefficient, piecemeal disposition. Thus, the Court dismissed Jackson’s appeal as premature.

The *Jackson* case illustrates that further appeal rights are not triggered until an administrative agency issues its final decision and that in the event a new decision is issued, the employee would be required to file a new or supplemental petition for writ of mandate based on any new decision before appealing from that judgment.

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### **Chapter 3: Workers Compensation and Retirement**

***Vann v. City and County of San Francisco, 97 Cal.App.5th 1013 (2023) – City Firefighter Could Not Sue City for Negligence***

In December 2023, the Court of Appeal affirmed that Workers Compensation is the exclusive remedy for employees of a local government agency who are injured within the scope of the Workers Compensation Act, even when the employee's injury arises out of the conduct of another employee in a different department within the agency.

On November 2, 2020, Matthew Vann, a firefighter with the San Francisco Fire Department (SFFD), responded to an emergency in the heart of downtown San Francisco. Louis Yu, a bus driver with the San Francisco Municipal Transportation Agency (SFMTA) drove through the active emergency area, and over a fire hose attached to a fire engine near where Vann was working. This caused the fire hose to become entangled in the bus's wheels, break off from the fire engine, and sweep Vann off his feet and backwards onto the ground. Vann sustained catastrophic injuries, including a traumatic brain injury, a fractured left clavicle, an internal hemorrhage in his right eye, and damage to his throat and vocal chords.

The City began processing his workers' compensation claim. However, on August 18, 2021, Vann submitted an application for leave to present a late government tort claim to the City. On August 31, the City granted leave to present the claim, but ultimately denied it.

On November 8, Vann filed a complaint against the City and Yu (collectively, respondents), alleging causes of action for motor vehicle negligence, general negligence, and negligence per se. On February 2, 2022, respondents filed a demurrer on various grounds, including that the Workers' Compensation Act provides the exclusive remedy for appellant's claims against the City as his employer and against Yu as his co-employee. Generally, if an injury falls within the scope of the Workers Compensation Act, then the Act is the employee's exclusive remedy. Thus, the Respondents argued that trial court lacked subject jurisdiction.

Opposing the demurrer, Vann argued that he and Yu were not co-employees because Vann was employed by SFFD, while Yu was employed by SFMTA, and that these were separate legal entities akin to separate business within a multiunit corporate enterprise. The Respondents replied that California courts have rejected that government departments are akin to separate business entities and can thus be subdivided into different entities for purposes of the workers' compensation law. Therefore, they argued that SFFD and SFMTA, as municipal departments, "have no 'legal personality separate from' the City." The trial court agreed and sustained the demurrer. Vann Appealed.

The Court of Appeal agreed with the lower court. First, the Court examined whether SFFD and SFMTA could be considered separate legal entities from the City, and determined they could not, because they were not sufficiently independent. Vann admitted that SFFD was part of the City's executive branch and therefore, not a separate legal entity. To analyze whether SFMTA was an independent entity, the court looked at several factors, including: whether the entity has a separate governing body; and whether the entity has statutory power to own property, levy taxes, or incur indebtedness in its own name. The City Charter and other municipal codes listed SFMTA as an agency that is part of the City, its Board of Directors was

appointed by the City's Mayor and confirmed by the City's Board of Supervisors, and there was no declaration that SFMTA was a separate legal body. Thus, the Court rejected Vann's argument that SFMTA was a separate entity from the City and/or SFFD. The Court dismissed Vann's separate negligence lawsuit, finding that his exclusive remedy was through workers compensation.

The *Vann* case provides helpful clarification that municipal departments may be deemed part of a single employer for purposes of establishing liability.

***Estrada v. Public Employees' Retirement System, 95 Cal.App.5th 870 (2023) – Payroll Employee Forfeited Years of CalPERS Benefits Upon Her No Contest Plea***

Elaine Estrada worked for the City of La Habra Heights as an account and payroll administrator from November 7, 2005, to August 24, 2012.

In April 2016, the Los Angeles County District Attorney's Office charged Estrada with unauthorized computer access, misappropriation of public funds, and embezzlement by a public officer for removing payroll deductions, resulting in her not paying the required employee share for dependents covered on her health insurance plan. The misconduct occurred between 2007 and 2009 and was not discovered at the time because Estrada was responsible for the payroll and timekeeping of all City employees.

On June 28, 2017, Estrada entered into a plea agreement, which involved pleading no contest to the unauthorized access to a computer system or network, but sentencing would be delayed for six months, at which time the felony plea would be vacated and a misdemeanor plea of no contest would be entered in its place. Additionally, she would return to the City the amount of money she owed (\$5,780.20) and serve one year of probation starting on the date of her sentencing.

Estrada verbally acknowledged that she understood these terms and that a plea of no contest is treated as a finding of guilt. Estrada's plea was then entered. Estrada complied with her plea agreement and the charge was reduced from a felony to a misdemeanor. After serving one year of probation, the criminal case against her was dismissed in March 2019.

On April 10, 2018, while Estrada was serving probation, the City submitted a forfeiture of benefits form to CalPERS that stated Estrada had been convicted of a job-related felony. CalPERS notified Estrada that because of her felony conviction, a portion of her accrued retirement benefits was subject to forfeiture. Government Code Section 7522.72, which was enacted as part of California's pension reform in 2013, provides that if a public employee is convicted of a felony for conduct arising out of or in the performance of official duties, the employee forfeits certain accrued retirement benefits, which "shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction." Estrada was also ineligible to return to CalPERS-covered employment or accrue further CalPERS benefits.

On June 21, 2018, Estrada appealed the forfeiture action, arguing she was not convicted of a felony because she withdrew her plea to a felony and entered a new plea of no contest to a misdemeanor. An Administrative Law Judge issued a proposed decision denying the appeal, and the CalPERS Board of Administration adopted that decision which found that Estrada forfeited benefits from September 1, 2007, the earliest date of the commission of the felony, through June 28, 2017, the date of her felony conviction. Estrada then filed a writ in Superior Court, which was also denied. Estrada appealed.

The Court of Appeal found that while the term “conviction” is not defined in Government Code Section 7522.72, it is recognized in California that a plea of guilty (and therefore, a plea of “no contest”) constitutes a conviction. Under the plain language of section 7522.72, a public employee's accrued retirement benefits are subject to forfeiture upon his or her conviction of a job-related felony. As a result, once Estrada pled no contest to a felony charge related to the scope of her employment, she was effectively convicted of a felony at that time, for purposes of Section 7522.72, even if the felony was later reduced to a misdemeanor.

Further, the Court held that Estrada's retirement benefits remained forfeited notwithstanding the reduction of the felony to a misdemeanor and dismissal of the charge. The Court reasoned that, in enacting section 7522.72, the Legislature explicitly provided that it intended for a felony conviction that is later reduced to a misdemeanor in a postconviction proceeding to be treated as a felony for purposes of determining the forfeiture of a convicted employee's retirement benefits. Section 7522.72 thus provides that a member convicted of a job-related felony “shall forfeit all the rights and benefits earned or accrued” from the earliest date of the commission of the felony through the date of the conviction, and that the rights and benefits shall remain forfeited notwithstanding any reduction in sentence following the date of the member's conviction.

The *Estrada* case demonstrates that employers may prevent public employees who commit workplace misconduct that rises to the criminal level from receiving CalPERS benefits. This should serve to deter criminal activity by public employees.

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## **Chapter 4: Workplace Violence Prevention Plan**

### ***Senate Bill 553 – Employers Must Have Workplace Violence Prevention Plan***

Senate Bill (SB) 553 amended Labor Code section 6401.7 and added Labor Code section 6401.9, requiring employers to adopt and implement a Workplace Violence Prevention Plan (WVPP) and corresponding training for their employees by July 1, 2024.

Specifically, SB 553 requires that employers establish, implement, and maintain, at all times in all work areas, an effective WVPP containing specified information. Employers must record information in a violent incident log for every workplace violence incident, as specified, provide effective training to employees on the workplace violence prevention plan, among other

things, and provide additional training when a new or previously unrecognized workplace violence hazard has been identified and when changes are made to the plan.

Employers must also create records of workplace violence hazard identification, evaluation, and correction and training records to be created and maintained, and violent incident logs and workplace incident investigation records to be maintained. An employer's WVPP must be in writing, be available and easily accessible to employees, Designated Representatives, and the Division of Occupational Safety and Health ("DOSH") at all times.

On March 1, 2024, the DOSH, which is responsible for enforcing these sections of the Labor Code, published a model WVPP on their website and provided guidance on ways employers may comply with the requirements set forth in Labor Code section 6401.9.

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## **Chapter 5: Labor Law**

### ***Visalia Unified School Dist. v. Public Employment Relations Bd., 98 Cal.App.5th 844 (2024) – Employee's Service As A Union Officer Was Protected Activity But The District Was Justified In Terminating Her For Numerous Errors and Poor Performance***

Ramirez (full name omitted) was employed as a secretary at Visalia Unified School District for more than 20 years. Between 1997 and 2012, Ramirez received positive work evaluations. Starting in 2013, her evaluations became negative, and the District issued Ramirez multiple reprimand letters due to errors and performance issues, and then initiated termination charges against her.

The parties settled the termination charges in 2016 and Ramirez agreed to transfer to a position with Visalia Charter Independent Study (VCIS). VCIS "operates traditional and online independent study programs" and "is a dependent charter school, meaning it is part of the District. VCIS's funding is tied to student attendance which in turn depends on students completing work. In late 2016, Ramirez was nominated to serve as a union officer. At the time, her principal expressed concern about the impact union activity would have on Ramirez's work performance. Ramirez served as the local union chapter vice president and president between 2016 and 2018.

Ramirez's responsibilities at VCIS included entering student absences into a computer program. The attendance records were reported to the state and corresponded to funding for the school. In December 2017 or January 2018, a parent complained that a student was erroneously marked as absent. The VCIS principal investigated the complaint and discovered additional attendance entry errors. Ramirez made over 100 incorrect attendance entries between September 2016 and January 2018.



On January 9, 2018, Ramirez attended a school board meeting where she criticized District policy and the superintendent. The superintendent was at the meeting. The superintendent directed the VCIS principal to investigate deeper into Ramirez's errors. On January 22, 2018, two weeks after the board meeting, the District placed Ramirez on leave pending an investigation.

The investigation concluded that Ramirez had falsified records, created numerous errors, and her errors had created incorrect permanent student records. The investigation concluded that her mistakes exposed VCIS to potentially \$750,000 in liability for misreporting attendance to the state.

The District initiated termination charges against Ramirez. Ramirez contested the charges and received a hearing. The hearing officer substantiated all charges except for falsifying records. The District school board voted to terminate Ramirez's employment.

The California School Employees Association (CSEA) filed an unfair practice charge with the Public Employment Relations Board (PERB). CSEA alleged the District violated Government Code Section 3543.5, subdivision (a), by firing Ramirez in retaliation for engaging in protected union activity. PERB then formally issued a complaint.

The District argued that simply being a union officer was not protected activity, CSEA failed to prove retaliation, and the District would have terminated Ramirez regardless for inadequate performance. PERB found in Ramirez's favor. First, PERB overturned prior PERB precedent and found that serving as a union officer is protected activity. Second, PERB held that the District retaliated against Ramirez for her union activity. PERB looked at multiple factors but particularly focused on the close timing between Ramirez's criticism of the superintendent and the subsequent investigation. Finally, PERB found the District failed to prove it would have terminated Ramirez for performance had she not engaged in protected union activity. PERB ordered the District to reinstate Ramirez to her position or its equivalent. The District appealed.

The Court of Appeal accepted PERB's conclusion that the District terminated Ramirez in retaliation for her protected activity. PERB based its retaliation finding on six factors. The Court of Appeal found that PERB's conclusions as to four of those factors were reasonable. First, the timing between Ramirez's critical comments and placement on leave was suspicious. Second, the District placed Ramirez on leave without immediately telling her the nature of the investigation. Third, the investigation was rushed. Fourth, the District demonstrated union animosity by first discouraging Ramirez from taking union office and then prohibiting her from entering District property and communicating with union members while on leave.

However, the Court of Appeal disagreed with two of the factors that PERB relied upon in its retaliation analysis. The Court of Appeal held that PERB was wrong to find the District subjected Ramirez to disparate treatment and disproportionate punishment. PERB had found disparate treatment because the District had never previously audited attendance reporting nor terminated an employee for misreporting attendance. The Court of Appeal held this did not support a finding of disparate treatment because there was no evidence that another employee had misreported attendance. PERB's disproportionate punishment finding was also unreasonable

because Ramirez's errors were serious so the District was not required to engage in progressive discipline. Additionally, the District was allowed to use the parties' prior settlement as evidence of a long history of misconduct and performance issues.

If an employer has anti-union motives, the employer will not be liable for violating the Educational Employment Relations Act (EERA) if it can show it would have discharged the employee anyway for legitimate business reasons. The court of appeal held the District successfully proved it would have terminated Ramirez regardless of any anti-union motives.

The Court of Appeal stated that the District would have uncovered Ramirez's numerous errors, even if she had not engaged in union activity. The investigation originated in a parent's legitimate complaint. PERB and CSEA argued that Ramirez should not have been terminated because her mistakes were minor, the District corrected them, and no harm occurred. The Court of Appeal disagreed. It found the errors were serious, numerous, and occurred over several years. Ramirez's mistakes also could affect VCIS's funding and student permanent records. The District was legitimately concerned the state could shut down VCIS for misreporting attendance. The District was not required to continue to employ a person who repeatedly committed serious errors and might continue to do so in the future.

The Court of Appeal overturned PERB's order to reinstate Ramirez and ordered PERB to dismiss the complaint against the District.

The *Ramirez* case demonstrates that even employers who engage in good faith discipline of employees may end up facing an unfair practice charge for their conduct. In those situations, a clear record of valid corrective action taken against the employee can go a long way to demonstrating that the employer would have taken that action regardless of the employee's union activity.

***Registered Nurses Professional Association and S.E.I.U. Local 521 v. County of Santa Clara, PERB Decision 2876-M (2023; judicial appeal pending) – Emergency Did Not Relieve County of Duty to Give Notice and an Opportunity to Bargain***

Among the County of Santa Clara's (County) many functions, it provides medical services through a county health system that includes the Santa Clara Valley Medical Center (SCVMC) hospitals and clinics. The Registered Nurses Professional Association (RNPA) represents 3,000 registered nurses working for the County, and Service Employees International Union Local 521 (SEIU) (collectively, the Unions) represents approximately 11,000 County employees.

On February 3, 2020, the County Director of Emergency Services declared an emergency in response to COVID-19. On February 10, the County Board of Supervisors ratified and extended the February 3 emergency declaration. On March 4, California Governor Gavin Newsom declared a state of emergency due to COVID-19.

Between mid-March 2020 and May 2020, the County took numerous actions regarding the working conditions of members of the Unions. These actions included, but were not limited to, scaling back on-site staff and services at several County clinics and sites, amending its policies concerning disaster service workers (DSW) (including Union members), assigning nurses to privately-owned skilled nursing facilities, and assigning represented employees to work at motels. The County assigned nurses to facilities that had staffing shortages without notifying the RNPA and also assigned two employees to prepare a motel for use by unhoused people without training the employees or notifying the Union. One modification to the DSW policy stated that an employee who was the sole parent of a child could refuse a DSW assignment, but an employee living with a medically vulnerable family member might not be able to refuse.

Throughout this time period, the County consistently met with the Unions to discuss the assignments and working conditions of Union members. Despite meeting with the Unions and listening to their concerns, and their requests to bargain over the terms and conditions of employment, the County asserted that it had no duty to meet and confer. The County asserted that this duty was suspended due to the multiple declared emergencies.

The Unions filed an unfair practice charge on May 6, 2020. The parties participated in 19 formal hearing days, by video conference, between August 2020 and March 2021. After two rounds of post hearing briefs in September and October 2021, the ALJ issued the proposed decision, and on January 23, 2023 all parties filed exceptions and responses. The predominant issues before PERB concerned the County's asserted emergency defense.

PERB concluded that: 1) the County could take necessary measures to save lives without first reaching an impasse or agreement, though it had a duty to afford the Unions notice and an opportunity to bargain in good faith to the extent practicable under the circumstances; and 2) the County failed to comply with that duty.

PERB opined that the County could have provided the Unions notice when the County was still considering emergency measures. PERB felt that in some instances, the notice would have allowed negotiations to begin before a decision was finalized. Even when that was not possible, PERB thought that notice to the Unions would typically have allowed at least a preliminary bargaining session before employees were notified. Finally, PERB noted that had the parties been unable to reach agreements, earlier notice would have made it clear the County was doing all it could to bargain, leading to more harmonious labor relations in a difficult period.

The County is currently appealing this decision. Until the Court of Appeal weighs in on this PERB decision, be aware that emergency conditions do not relieve a public employer from giving a union notice and an opportunity to meet and confer.

***Teamsters Local 2010 v. Regents of the University of California, PERB Decision No. 2880-H (2023) – Prohibiting Union-Related Insignia on University Vehicles Was Unlawful***

Eduardo Rosales was an electrician for the University of California at its San Diego campus (University). Since 1991, Rosales has operated the University truck assigned to him, and

he and the other employees in his department spent much of their workday in the field with their assigned trucks. The University of California maintained a policy that stated, in part:

*“No other decals, stickers, or other signs, including dealer-identified license plate holders, shall be placed on any University vehicle, except that a Chancellor may authorize exceptions on a case-by-case basis.”*

The Teamsters represented employees in the skilled trades, including Rosales. In 2018, Rosales distributed to unit members Teamsters magnets that affix to a vehicle bumper and to other metal surfaces. The bumper magnets leave no residue and cause no damage to a vehicle. They can be removed nightly or when the driver ceases operating the vehicle. The bumper magnets contain the Teamsters’ union insignia and the message “We are Teamster Strong!

At the same time, other skilled trades employees affixed personal stickers to their University vehicles that did not reference the Teamsters, such as sticks for the band “Guns N Roses,” and a sticker for the restaurant, “L & L Hawaii.” These had been displayed before and after Rosales was directed to remove the Teamsters magnets. The University never made an employee remove Union-related insignia from their cubicles, and in fact allowed for it under the University’s policies.

Teamsters filed an unfair practice charge alleging that the University interfered with Rosales’ protected rights by implementing a policy prohibiting skilled trades employees from placing a union insignia magnet on a University vehicle. The administrative law judge dismissed the allegation, finding the policy did not interfere with employee protected rights. Teamsters filed a Statement of Exceptions and a supporting brief excepting to many of the proposed decision’s factual and legal findings. The University filed a response, urging PERB to affirm the proposed decision.

PERB found that the Teamsters showed that the University interfered with union/employee rights because the University’s ban on union magnets contradicted years of PERB precedent and California public employees have long had the right to display union insignia in the workplace.

In addition, PERB found that the University did not show that the magnet negatively affected its operations such as by posing a safety risk, disrupting employee discipline, distracting from work demanding great concentration, or damaging employer property.

Finally, although the Teamster’s unfair practice charge did not allege discrimination, PERB found that the University’s selective enforcement of its vehicle insignia policy was discriminatory, reflecting enforcement against union insignia, but not against dealership license-plate frames and other messages unrelated to University business, such as those related to sports, music, or restaurants. The University only applied the policy more broadly when it decided to crack down on union magnets. Here, PERB found that the University’s discriminatory enforcement singled out union speech, and the timing of its broader crackdown showed it was motivated by an attempt to target protected activity.

While this case was decided under the Higher Educational Employer-Employee Relations Act (HEERA), which governs college and university employees, it applies broadly to all statutes

administered by PERB including the Meyers-Milias Brown Act. This decision also demonstrates the high burden public employers must meet to justify interference with employees' protected rights.

***State of California (California Correctional Health Care Services), PERB Decision No. 2888-S (2024; judicial appeal pending) – PERB Finds Retaliation but no Denial of Right to Union Representation.***

Sean Kane worked as a pharmacist for the State of California (California Correctional Health Care Services) (CCHCS) at California State Prison Corcoran (Corcoran). Kane was also an AFSCME, Local 2620 job steward. Kane reported to Michael Conner, the Pharmacist-In-Charge at Corcoran. Conner reported to CCHCS Chief Executive Officer Celia Bell.

Between January 2020 and November 2020, Conner repeatedly advised staff to wear a face mask and stay six feet away from other staff in accordance with COVID-19 restrictions.

Kane filed a grievance alleging that Conner had violated the parties collective bargaining agreement by discontinuing pharmacists' standby assignments, thereby eliminating their ability to earn extra pay, and instead using voluntary callback procedures. Bell denied the grievance.

On November 4, 2020, Kane sent identical information requests in separate e-mails to Conner, Labor Relations Advocate Elane Jalil, and Personnel Specialist Helen Ybarra. In each e-mail, Kane identified himself as an AFSCME steward and asked if any Corcoran pharmacists had received standby pay since September 14.

After exchanging several emails on November 3 about Kane's efforts to purchase a needed medication, Conner asked Kane to meet with him in his office on November 4. Kane arrived and remained standing in Conner's doorway. As Conner attempted to discuss how to acquire the needed medication, Kane interrupted and demanded responses to the e-mails Kane had sent in his capacity as an AFSCME steward regarding standby assignments. This back and forth continued, before Kane demanded union representation. Conner told Kane that their meeting was not disciplinary, and that no representative was necessary. Kane continued to talk over Conner and request representation, at which point Conner told Kane that his actions may constitute insubordination.

Kane, still in the doorway, called for another employee to join as a witness. Conner then stood up, walked to the doorway, and told the other employee to remain at her workstation. Kane turned back toward Conner, leaned forward and curled his fingers. Conner, noticing that Kane's face mask was too low to cover his mouth and nose, asked Kane to step back and pull up his mask. Kane pulled up his mask but did not immediately step back. Conner then said that Kane should return to his workstation. Kane complied.

On November 5, Corcoran administrators convened a workplace violence committee meeting and decided that Kane would be temporarily reassigned. While Kane was being escorted to his new work location, Kane passed Conner's office. Kane kicked the 100-pound steel office

door, slamming the door shut and startling Conner. Following an investigation, CCHCS issued Kane a Notice of Adverse Action (NOAA), dismissing him for allegedly violent conduct on November 4 and 5. Kane appealed to the State Personnel Board (SPB). The SPB ruled that Kane's conduct, while inappropriate, was not violent as CCHCS alleged, and lowered the discipline to a one-month suspension.

AFSCME filed an unfair practice charge against CCHCS, alleging that CCHCS unlawfully denied Kane's request for union representation during the November 4 discussion at Conner's office, and that CCHCS had terminated Kane in retaliation for his protected conduct. PERB's Office of the General Counsel (OGC) issued a complaint. Following a hearing before an administrative law judge (ALJ), both parties filed exceptions.

PERB found that AFSCME failed to establish that Conner unlawfully denied AFSCME or Kane representational rights. PERB noted that Conner began the meeting with a discussion of routine work matters. If Conner and Kane had discussed the specifics of the pending information requests relevant to the grievance, that would have triggered representational rights. But nothing required Conner to discuss the information requests during a brief, work-related meeting Conner had called, and Conner declined to do so when Kane mentioned them. PERB also found that it was a closer question whether representational rights were triggered when Conner told Kane that his actions may constitute insubordination—a comment that came after the employee first demanded union representation. Nevertheless, after Kane called the other employee to join the meeting, Conner told the employee to stay at her workstation, asked Kane to comply with COVID-19 protocols, and ended the meeting without any investigative questions or further mention of insubordination. None of these events triggered representational rights.

On Kane's retaliation claim, PERB found Kane's protected activity was at least a substantial or motivating cause of the decision to discipline. In support of that finding, PERB noted that Kane's protected requests for information occurred within days before his discipline, and that management exaggerated the facts of Kane's misconduct.

PERB found insufficient evidence to determine what level of discipline CCHCS would have imposed absent Kane's protected activities. PERB was particularly interested in evidence regarding the disciplinary penalties for other employees, who had no previous adverse actions – like Kane.

PERB remanded the matter for mediation and, absent a settlement, for further proceedings to determine what level of discipline CCHCS would have imposed absent the employee's protected activities.

The *State of California* case is a helpful reminder that both the SPB and PERB have very wide latitude in selecting and enforcing remedies of the Boards' choosing.

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## **Chapter 6: First Amendment**

### ***Noon v. City of Platte Woods, 94 F.4th 759 (8th Cir. Mar. 4, 2024) – A City Mayor and Chief of Police Were Not Entitled to Qualified Immunity for Firing Two Officers who Raised Concerns Over the Chief’s Job Performance and Alleged Misconduct***

Thomas Noon and Christopher Skidmore (Officers) were Officers with the Platte Woods, Missouri Police Department (Department). Over the course of their employment, the Officers raised several concerns about James Kerns's performance as Chief of Police. Skidmore notified Kerns that Department vehicles were not operating properly and radar equipment gave false readings. Noon also raised concerns about personnel issues and Kerns's use of Department time to conduct personal business. The Officers claim Kerns failed to address any of these concerns.

On September 9, 2019, frustrated with the Department's management, Noon met with Kerns. During this meeting, Noon encouraged Kerns to resign as Chief of Police and handed Kerns a pre-drafted resignation letter. Kerns did not resign.

On September 12, 2019, the officers sent a document (Complaint Packet) outlining their concerns about the Department to Platte Woods Mayor John Smedley and the Platte Woods Board of Aldermen. The Complaint Packet was sent anonymously, and it included a list of complaints about Kerns's leadership, which "led to chronic, systemic and significant issues within the Department." The Complaint Packet also included a copy of the Department's standard operating procedures and noted "over 180 violations" and "a supplemental document with numerous other examples of specific public safety concerns or simply things that discourage officers." By mid-November, after an investigation into the Complaint Packet's allegations had yet to commence, Noon and Skidmore informed Mayor Smedley they had authored the document. Skidmore's job duties were then changed so that he was no longer able to assign shifts.

On December 4, 2019, a local newspaper wrote about the Complaint Packet's allegations. Two days later, Kerns learned someone anonymously sent an email containing the allegations to the Ararat Shriners organization, of which Kerns was a member. In January 2020, both Officers were removed from the Department's schedule, and by March 2020, they both had been fired.

The Officer's sued Smedley and Kerns alleging First and Fourteenth Amendment violations by retaliating against them for reporting concerns about the Department. Smedley and Kerns removed the case to federal court and moved for summary judgment, claiming they were entitled to qualified immunity. When conducting a qualified immunity analysis, the court uses a two-part inquiry to determine (1) whether a constitutional violation occurred, and (2) whether the right in question was clearly established at the time of the violation. The district court denied the motion and found there was a genuine dispute of material fact as to whether Smedley and Kerns violated the Officers' First Amendment rights. Smedley and Kerns appealed.

The 8th Circuit Court of Appeals held that Smedley and Kerns were not entitled to qualified immunity because the Officers' had created a genuine dispute of material fact as to whether Smedley and Kerns violated their First Amendment rights.

To succeed on a First Amendment Retaliation claim, a party must prove (1) they engaged in protected activity, (2) the employer took an adverse employment action against them, and (3) the protected speech was a "substantial or motivating factor" in that decision to take the adverse employment action.

Here, Smedley and Kerns did not contest whether the Officers suffered an adverse employment action or the causal connection between the two events. The Court focused on the first element which was whether the Officers engaged in protected activity. The Court specified that for this analysis, a public employee engages in protected activity only if the employee "spoke as a citizen on a matter of public concern" and that if the speech "owes its existence to a public employee's professional responsibilities" it is not made as a private citizen.

The Court found that the Officers' speech, taken in the light most favorable to them, was made outside their regular duties as police officers. Many grievances within the Complaint Packet, such as reporting Kerns's alleged corrupt billing practices, or concerns with Kerns's alleged dissemination of explicit images, or alleged bias in favor of the Ararat Shriners organization, did not relate to their various duties as police officers.

Further, the Court found that the Officers' speech was a matter of public concern. The issues raised in the Complaint Packet largely concerned the integrity of the Department and its leadership. The Complaint Packet also included concerns about corruption, financial mismanagement, and investigative failures. Such allegations are related to institutional integrity—an important governmental function.

The Court then analyzed whether Smedley and Kerns proved that the Officers' speech had an adverse impact on the efficiency of the Department's operations. The Court found that Smedley and Kerns made the threshold showing of disruption to trigger the *Pickering* balancing test, under which a court decides whether the parties statements were of such public and social importance as to override the employer's substantial interest in maintaining the efficiency and reputation of the workplace, given the nature of the office. This analysis requires the court to look at: (1) the need for harmony in the work place; (2) whether the government's responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

The Court held that despite Smedley and Kerns offering some evidence of interoffice disharmony, the *Pickering* factors weighed in favor of the Officers' First Amendment interest. The Complaint Packet alleged, among many other things, financial mismanagement, workplace misconduct, and serious investigative failures. The Court ruled that the public would certainly be interested in these issues. Moreover, there is no evidence that the Officers were unable to perform their job duties after submitting the Complaint Packet, and this was not an "extreme



situation," where "the employee unduly breached confidentiality or disrupted intimate working relationships.”

Finally, the Court found that the Officers' First Amendment right was clearly established such that a reasonable official would have known firing them was unlawful, and the Court concluded Smedley and Kerns had fair notice their alleged adverse actions were unlawful. Thus, Smedley and Kerns were not entitled to qualified immunity.

The *Noon* case is a reminder that public employers should carefully analyze the factual circumstances preceding a disciplinary decision to evaluate if the employee engaged in protected activity under 42 U.S.C. Section 1983.

***Massaro v. Fairfax Cnty., 95 F.4th 895 (4th Cir. Mar. 19, 2024) – A Police Officer’s First Amendment Retaliation Claim Failed When the Alleged Protected Speech Was Made in the Context of a Police Department’s Internal Grievance Procedures***

Peter Massaro was a police officer with the Fairfax County Police Department. From February 2018 to May 2020, Massaro was the supervisor of the firearms training range at the Fairfax Criminal Justice Academy (the "Academy"). There, Massaro was responsible for training the entire Police Department, the Fairfax County Sheriff's Department, and the Police Departments for neighboring towns, in the use of firearms. Massaro, however, was frustrated after twice being passed over for promotion to First Lieutenant, even though he had passed the requisite examination and believed he was the most qualified candidate for the position. He was not selected in April 2018, nor was he selected in September 2018. To Massaro's chagrin, two women he saw as less qualified than him were promoted to First Lieutenant during these cycles: Marisa Kuhar and Loriann LaBarca.

When Kuhar was promoted, Massaro filed a discrimination complaint (2018 Complaint) with Fairfax's Office of Human Rights and Equity Programs (OHREP), alleging that Chief Edwin Roessler had promoted Kuhar instead of Massaro only because of Massaro's sex (later amended to include similar claims of age and race discrimination). Kuhar's promotion had since been rescinded and deferred, as Chief Edwin Roessler had mistakenly believed Kuhar possessed the credentials necessary for promotion. A male officer was promoted in Kuhar's place, and her promotion was deferred until she could complete the required educational credits. Massaro's 2018 Complaint was dismissed on the grounds that he had not suffered an adverse employment action on which a complaint could be based.

In May 2019, eight months after Massaro filed his 2018 Complaint, Chief Roessler was looking to reform the Academy where Massaro worked after a series of concerning events, including an accidental firearm discharge, allegations that a range instructor used a racial slur against black police officers, and a widespread failure to follow departmental policies. As part of the reform efforts, Chief Roessler transferred Major Paul Cleveland to the Academy to take over as commander. He hoped Major Cleveland could get the place back on track.

Massaro alleged that Major Cleveland was actually sent to the Academy to punish and ultimately get rid of Massaro as retribution for his 2018 complaint against Chief Roessler. Massaro alleged that when asked why he had been transferred to the Academy, Cleveland told Massaro that his “complaint against the Chief isn't helping you and isn't helping the situation.” When First Lieutenant Loriann LaBarca visited to the Academy on May 22, 2019, she asked Massaro if he believed she only got promoted because she was a woman. Massaro replied that there were others who were more qualified than her to be First Lieutenant, and that he believed sex was a "decisive factor" in her promotion, angering LaBarca.

LaBarca reported the conversation to Major Cleveland. Major Cleveland disclosed the matter to the IAB investigators on duty, who decided to launch a formal investigation into the matter. IAB investigators Second Lieutenants Andrew Hirshey and Dana Ferreira met with Massaro. The conversation went off the rails, leading to an incensed Massaro opining at length about why his confrontation with LaBarca was justified. Massaro was inflamed, pacing about the room in a fury. Major Cleveland entered the interview room and spoke to Massaro, allegedly telling him that he thought “that Loriann LaBarca makes a fine commander. What do you think about that?” Major Cleveland then left the room. When Hirshey and Ferreira returned, they told Massaro he would be relieved from duty for violating Department Regulation 201.14 against unlawful discrimination and Regulation 201.13 mandating that employees treat individuals with respect, courtesy, and tact. Massaro was placed on leave and appealed the IAB findings.

After a lengthy departmental appeals process that ultimately reduced Massaro’s termination to a disciplinary assignment transfer out of the Academy, the case came to Chief Roessler who was the final decisionmaker in the Department on such matters pursuant to Virginia state law. Chief Roessler upheld the findings and transferred Massaro from the Academy over fierce objection by Massaro.

Massaro sued Fairfax County in the Eastern District of Virginia, alleging retaliation in violation of Title VII, the ADEA, and the First Amendment under 42 U.S.C. Section 1983. After discovery, both parties moved for summary judgment. The Court found that all three of Massaro’s claims failed because there was no evidence showing a causal relationship between Massaro's protected activity (the 2018 Complaint against Chief Roessler) and the adverse employment action Massaro suffered, nor that the alleged protected activity was a substantial factor in the Department’s decision to discipline him. Massaro appealed.

The Fourth Circuit Court of Appeals upheld the trial court’s ruling that Massaro could not prevail on either his Title VII and ADEA claims. Turning to Massaro’s 42 U.S.C. Section 1983 claim, the Court held that Massaro’s 2018 Complaint, made via an internal grievance process, does not reflect a matter of public concern. The Court reasoned that although "discriminatory institutional policies or practices can undoubtedly be a matter of public concern," Massaro did not file his 2018 Complaint to draw public attention to the problems he saw with the Department. Instead, Massaro's real beef (in the Court’s words) with the Department was that he, personally, was not promoted in lieu of a woman he viewed as unqualified. Here, Massaro filed his complaint with OHREP, the County office charged with investigating grievances and complaints

made by County employees. Massaro thus sought to improve his own station by following internal procedures, rather than by communicating the alleged discriminatory practices to the public through a more transparent and accessible medium. Thus, the Court held that while he had every right to communicate through a more public and transparent medium, the strategy he actually took reflected the private nature of his speech.

Finally, the Court reasoned that to transform run-of-the-mill employee complaints into social and political commentaries backed by the full weight of the Constitution would turn the workplace into a constitutional landmine, while offering public employees inflated speech rights not shared by their private counterparts. Thus, the Court affirmed the district court's grant of summary judgment to the County on Massaro's First Amendment claim.

The *Massaro* case is instructive on when speech made by a public employee is a matter of public or private concern. This also requires careful analysis of the factual circumstances around how and when the speech at issue was made.

**LEAGUE OF CALIFORNIA CITIES  
CITY ATTORNEYS' SPRING  
CONFERENCE**

**Labor and Employment  
Litigation Update**

*5/9/2024*

*PRESENTED BY:*

Elizabeth T. Arce and Jennifer Rosner

# Labor and Employment Litigation Update

League of California Cities: City Attorneys Spring Conference | May 9, 2024

Presented by: Elizabeth Tom Arce & Jennifer Rosner



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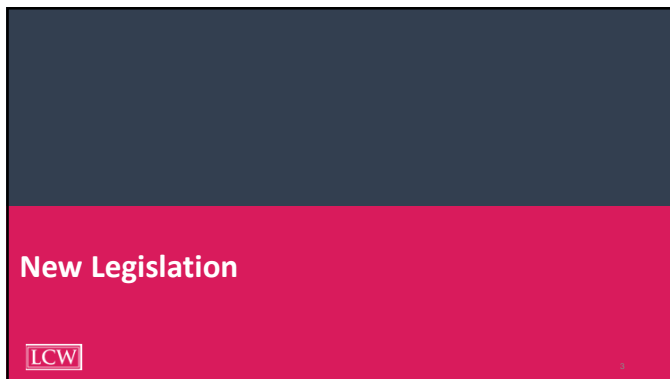
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# Labor and Employment Litigation Update

League of California Cities: City Attorneys Spring Conference | May 9, 2024

Presented by: Elizabeth Tom Arce & Jennifer Rosner

**Public Records Act**

- Senate Bill 400 – Law Enforcement Agencies May, but are Not Required to, Release Statements Announcing Terminations of Police and Custody Officers
  - Penal Code Section 832.7(b)(13)

LCW LIEBERT CASSIDY WHITMORE

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**Workplace Violence Prevention**

- SB 553 – Employers Must Implement and Train Employees on a Workplace Violence Prevention Plan by July 1, 2024
  - Labor Code Section 6401.7 & 6401.9 (Effective 1/1/24, compliance required 7/1/24)

LCW LIEBERT CASSIDY WHITMORE

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**Employee Discrimination & Discipline**

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# Labor and Employment Litigation Update

League of California Cities: City Attorneys Spring Conference | May 9, 2024

Presented by: Elizabeth Tom Arce & Jennifer Rosner

**Discrimination – Liability**

- The California Supreme Court Significantly Expands the Liability of an Employer’s Agents
  - *Raines v. U.S. Healthworks* (8/21/23) 15 Cal.5th 268

LCW LIEBERT CASSIDY WHITMORE

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**Discrimination – Sanctions**

- Terminating Sanctions Were Proper in an Employment Discrimination Case Where Ample Circumstantial Evidence Showed That The Plaintiff Deleted and Hid Text Messages With Witnesses, Intentionally Spoliating Electronic Evidence
  - *Jones v. Riot Hospitality Group LLC* (9th Cir. 2024) 95 F.4th 730

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**Hostile Work Environment**

- University Had a Legitimate Reason to Terminate a Department Director When the Director Harassed and Retaliated Against Other Department Employees, Creating a Hostile Work Environment
  - *Martin v. Board of Trustees of California State University* (11/14/2023) 97 Cal.App.5th 149

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# Labor and Employment Litigation Update

League of California Cities: City Attorneys Spring Conference | May 9, 2024

Presented by: Elizabeth Tom Arce & Jennifer Rosner

**Discipline**

- Detention Officer's Disciplinary Appeal was Premature Because the Trial Court's Order That the Personnel Board Reconsider its Findings was Not a "Final Appealable Judgment"
  - *Jackson v. Board of Civil Service Commissioners of City of Los Angeles* (2/8/2024) 99 Cal.App.5th 648

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**Workers Compensation & Retirement**

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**Workers Compensation**

- City Firefighter Could Not Sue City for Negligence Because Workers Compensation is the Exclusive Remedy for Employees
  - *Vann v. City and County of San Francisco* (12/12/2023) 97 Cal.App.5th 1013

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**Retirement**

- Payroll Employee Forfeited Years Of CalPERS Benefits Upon Her No Contest Plea
  - *Estrada v. Public Employees' Retirement System* (9/21/23) 95 Cal.App.5th 870

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**Labor Law**

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**Labor Law**

- Employee's Service As A Union Officer Was Protected Activity But The District Was Justified In Terminating Her For Numerous Errors
  - *Visalia Unified School Dist. v. Public Employment Relations Bd.* (1/9/2024) 98 Cal.App.5th 844

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**Labor Law**

- Emergency Did Not Relieve County of Duty To Give Notice And An Opportunity To Bargain
  - *Registered Nurses Professional Association and S.E.I.U. Local 521 v. County of Santa Clara* (10/17/23) PERB No. 2876-M – JUDICIAL APPEAL PENDING

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**Labor Law**

- Prohibiting Union-Related Insignia On University Vehicles Was Unlawful
  - *Teamsters Local 2010 v. Regents of the University of California* (10/24/23) PERB No 2880-H

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**Labor Law**

- PERB Finds Retaliation but no Denial of Right to Union Representation
  - *State of California (California Correctional Health Care Services)* (2/8/24) PERB Dec. No. 2888-S – JUDICIAL APPEAL PENDING

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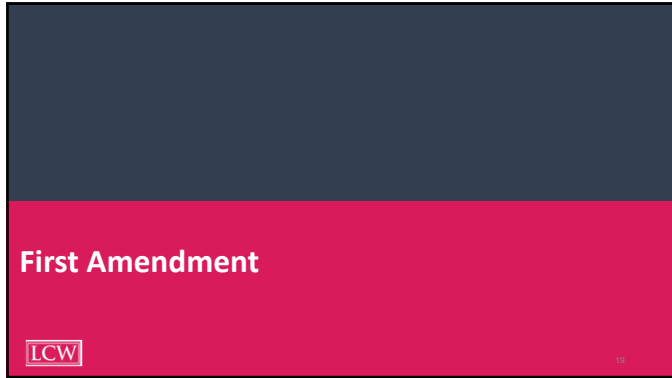
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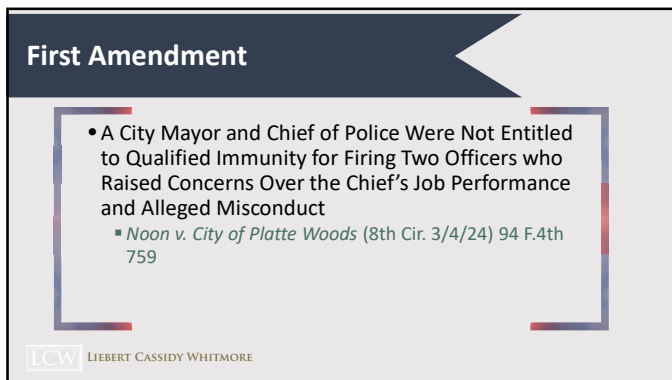
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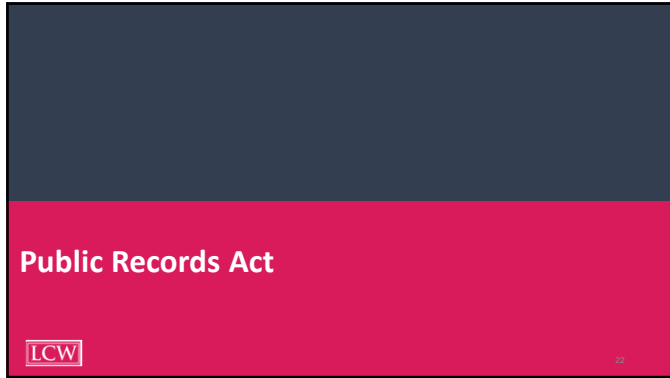
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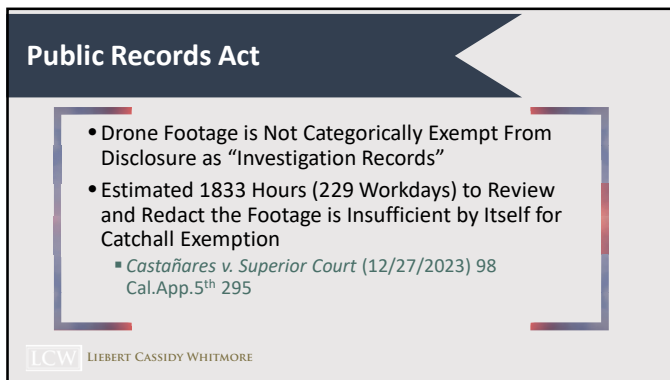
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