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Labor and Employment Litigation Update

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The Big Picture

- In the last sixth months there have been a wide range of labor and employment case decisions that will greatly impact public agencies. Below are some of the significant outcomes and common themes that are noteworthy:
  - The First Amendment offers broad protection for speech so agencies must be careful when disciplining employees for such speech.
  - Discrimination claims require quite little direct evidence in order to establish a prima facie case.
  - When imposing discipline on employees, it is important to offer full due process; Public agencies must prepare *Skelly* notices that fully and accurately state the basis for each charge, and the agency must be able to prove the basis for each charge.
  - In terms of pending legislation, there appears to be a push for expanding the definition of family for FEHA and Paid Family Leave.

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Chapter 1: Harassment, Discrimination, and Retaliation

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Discrimination - *Kaur v. Foster Poultry Farms LLC*

- Worker's Compensation Appeals Board (WCAB) decision does not prevent Plaintiff from pursuing claims under the Fair Employment and Housing Act (FEHA).
- Res judicata/collateral estoppel did not apply because Plaintiff's FEHA claims were broader than that decided in the WCAB case.
- *Kaur v. Foster Poultry Farms LLC*, 83 Cal.App.5th 320 (2022)

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Retaliation - *Killgore v. SpecPro Services,* LLC

- Ninth Circuit Court of Appeals held that Plaintiff's disclosures of wrongdoing to his supervisor, as a person with authority over Plaintiff, provided an independent ground for asserting a whistleblower retaliation claim.
- *Killgore v. SpecPro Services,* LLC 51 F.4th 973 (9th Cir. 2022)

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Discrimination – *Opara v. Yellen*

- Plaintiff's allegation that ageist comments were made in the workplace was enough to establish a prima facie case of age discrimination on a motion for summary judgment.
- However, once the employer provides sufficient evidence for its actions and the burden shifts back to Plaintiff, she could not rely on her own uncorroborated declaration to prove discriminatory pretext.
- *Opara v. Yellen*, 57 F.4th 709 (9th Cir. 2023)

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Harassment- *Atalla v. Rite Aid Corporation*

- Inappropriate text messages from supervisor to an employee could not be imputed to employer in a FEHA claim where the supervisor and subordinate had a pre-employment relationship.
- While employers are ordinarily strictly liable for harassment by a superior, the supervisor must be acting in their capacity as a supervisor when the harassing conduct occurs.
- *Atalla v. Rite Aid Corporation*, F082794, Super. Ct. No. 19CECG00569 (Filed 2/ 24/23; Cert. for Publication 3/14/23)

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First Amendment- *Houston Community College System v. Wilson*

- U.S. Supreme Court held a community college governing board's censure of one of its own members to be lawful.
- Court reasoned that the censure did not effect Wilson's ability to speak freely and exercise First Amendment rights.
- The Court also explained that the verbal censure was in itself an exercise of the governing board's First Amendment Rights because Wilson was an elected official.
- *Houston Community College System v. Wilson* (2022) 142 S. Ct. 1253, 1258, 212 L. Ed. 2d 303

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First Amendment- *Bresnahan v. City of St. Peters*

- Police Officer was able to advance First Amendment claim after he was forced to resign after sharing a controversial BLM video with other officers in a text message group.
- While speech shared with coworkers is generally not considered speech involving a matter of public concern, the court reasoned the fact that Plaintiff's coworkers were police officers cannot be overlooked.
- Employers must carefully analyze public employee's speech before enacting disciplinary action against the employee for their speech.
- *Bresnahan v. City of St. Peters*, 58 F.4th 381 (8th Cir. 2023)

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First Amendment- *Kirkland v. City of Maryville*

- City Patrol Officer posted Facebook posts criticizing County Sherriff and the City terminated her.
- Although the Patrol Officer spoke on a matter of public concern, the Court found the City's interest in maintaining a good working relationship with the County Sheriff outweighed the Patrol Officer's speech interest and, therefore, the termination was justified.
- *Kirkland v. City of Maryville*, Tennessee, 54 F.4th 901 (6th Cir. 2022)

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Chapter 2: Employee Leaves

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Military Leave- *Clarkson v. Alaska Airlines*

- Plaintiff 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.
- 9th Circuit reversed district court decision which compared the short-term military leave with all forms of military leave provided by the employer; instead, the district court should have compared the leave at issue with other short-term leaves offered by the company.
- To treat all types of military leave categorically would "render USERRA's protections meaningless," because "no other type of leave would look similar."
- *Clarkson v. Alaska Airlines*, Inc. 59 F.4th 42 (9th Cir. 2023)

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Chapter 3: Employee Discipline

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Discipline – *Rodgers v. State Personnel Board (Department of Corrections)*

- State Personnel Board's decision was set aside on due process grounds.
- Sergeant 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.
- The facts the ALJ found true at the hearing were significantly different from those the employer alleged in their charging document as the basis for the penalty.
- *Rodgers v. State Personnel Board* (Department of Corrections), 83 Cal. App. 5th 1 (2022)

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Discipline- *Shouse v. County of Riverside*

- Captain alleged Sheriff's Department violated the Public Safety Officers Procedural Bill of Right Act's (POBR) one-year statute of limitations for conducting an investigation since the Chief should have known earlier about Plaintiff's intimate relationships with County employees since they were the subject of the department's "rumor mill".
- Court of Appeal held an internal affairs investigation "should only be initiated when the office 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."
- *Shouse v. County of Riverside*, 84 Cal.App.5th 1080 (2022, rev. denied 2/1/23)

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Discipline- *Griego v. City of Barstow*

- Following receipt of arbitrator's advisory opinion reducing termination to suspension, the City Manager issued a final decision upholding termination and finding that there was sufficient evidence that Griego pursued an intimate relationship with a minor.
- Court of Appeal held the City did not abuse its discretion because the termination was "well within the City's broad discretion" and reasoned 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.
- *Griego v. City of Barstow*, 303 Cal.Rptr.3d 379 (2023)

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Chapter 4: Labor Law

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Bargaining- *SEIU Local 1021 v. City and County of San Francisco*

- City adopted vaccination and face covering policy without meeting and conferring on the grounds that it was a management right and outside the scope of representation.
- In determining when an employer must bargain a managerial position, PERB harmonized its test with the analysis in *County of Sonoma v. PERB.*
- PERB outlines a test that employers should fall in determining whether it must bargain a managerial decision and/ or its effect.
- *SEIU Local 1021 v. City and County of San Francisco, PERB Decision 2846-M (2022)*

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Chapter 5: Retirement Law

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Retirement- *CalPERS Circular Letter 200-014-23*

- CalPERS Circular Letter 200-014-23 requires agencies to provide more information to support decisions on local safety members' disability retirements.

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Chapter 6:
"Eye to the Future" – Pending California Supreme Court Decisions and California Legislation

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Discrimination- *Bailey v. San Francisco District Attorney's Office, et al.*

- A single racial epithet can be so offensive it gives rise to a triable issue of actionable harassment.
- The Court of Appeal focused on whether a 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's employment." 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.
- *Bailey v. San Francisco District Attorney's Office*, George Gascon, City & County of San Francisco, 2020 WL 5542657 – S265223

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Whistleblower Claim- *Garcia-Brower v. Kolla's, Inc.*

- Employee telling owner and operator that she had not been paid wages for her three previous shifts did not amount to a "public disclosure" as required under California's Whistleblower Statute.
- A violation of Labor Code section 1102.5 turns on whether there was a "disclosure" rather than a "report" of wrongdoing.
- *Garcia-Brower v. Kolla's, Inc.* - S269456

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Assembly Bill 524 – FEHA Protection for Family Caregivers

- Assembly Bill 524 (AB 524) would amend the FEHA to prohibit discrimination and harassment against an employee on the basis of their "family caregiver status".

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Assembly Bill 518 – Expansion of Paid Family Leave

- Assembly Bill 518 (AB 518) would expand eligibility for benefits under the paid family leave program to include individuals who take time off work to care for a seriously ill designated person.
- "Designated person" means any individual related by blood or whose association with the employee is the equivalent of a family relationship.
- The employee can identify the designated person when they file a claim for benefits.

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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 and the employer is required to grant it if:
  - The employee requested and was denied remote work as a reasonable accommodation before March 1, 2020;
  - The employee performed the essential functions of their job remotely for at least 6 of the 24 months preceding the renewed request; and
  - The employee's essential job functions have not changed since the employee performed remote work.
- Employer is not required to grant it if the employee can no longer perform all of their essential job functions remotely.

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Thank you!

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