Labor and Employment Litigation Update

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Geoffrey S. Sheldon, Partner, Liebert Cassidy Whitmore

LCW LIEBERT CASSIDY WHITMORE

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Geoffrey S. Sheldon
LIEBERT CASSIDY WHITMORE
6033 W. Century Blvd., Fifth Floor
Los Angeles, CA 90045
Telephone: (310) 981-2000

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I. INTRODUCTION

In our view, the past year did not result in any landmark judicial decisions or legislative acts that fundamentally impact employment litigators. The most significant decision was a decision by the California Supreme Court which will make it much more difficult for employers to combat "whistleblower" retaliation claims brought under Labor Code section 1102.5. As whistleblower case filings have been on the rise over the past few years anyway, the State Supreme Court's decision will undoubtedly impact the volume of these types of cases even more.

The following are a few bills and court decisions that we feel employment law practitioners, particularly those that represent cities, may want to be aware of.

II. LEGISLATION

SB 807 – Modifies DFEH's Procedures for Enforcing Civil Rights Laws, Extends Employer Retention Requirement for Specified Employment Records.

Existing law, the California Fair Employment and Housing Act (FEHA), establishes the Department of Fair Employment and Housing (DFEH) to enforce civil rights laws with respect to housing and employment. The FEHA makes certain discriminatory employment and housing practices unlawful, and authorizes a claimant to file a verified complaint with DFEH. The FEHA requires DFEH to investigate administrative claims, and to attempt to resolve disputes through alternative dispute resolution (ADR). If ADR fails and DFEH finds the claim has merit, the FEHA authorizes the DFEH director to bring a civil action in the name of DFEH on behalf of the claimant within a specified amount of time.

SB 807 authorizes DFEH and a party under DFEH investigation to appeal adverse superior court decisions regarding the scope of DFEH's power to compel cooperation in the investigation within 15 days after the adverse decision. SB 807 further directs courts to give precedence to the appeal and to make a determination on the appeal as soon as practicable after the notice of appeal is filed. SB 807 authorizes courts to award attorney's fees and costs to the prevailing party in the action, except for a prevailing defendant, unless the court determines that DFEH's petition was frivolous when filed or that DFEH continued to litigate the matter after it clearly became frivolous.

SB 807 also extends the employer record retention requirement from two to four years when a complaint has been filed, and eliminates exemptions for a certain state agency (the State Personnel Board).

For a complaint treated as a group or class complaint, as specified, SB 807 will require the DFEH to issue a right-to-sue notice upon completion of its investigation, and not later than 2 years after the filing of the complaint.

SB 807 changes the deadlines by which some complaints for violations of civil rights laws must be filed with DFEH. Under current law, the FEHA prohibits filing a complaint with the DFEH alleging certain civil rights violations one year after the unlawful practice occurred.

The FEHA prohibits filing a complaint alleging a sexual harassment claim that occurred as part of a professional relationship three years after the unlawful practice occurred. SB 807 subjects the filing of a complaint with the DFEH alleging sexual harassment that occurred as part of a professional relationship to the one-year limitation.

SB 807 also tolls the statute of limitations, including retroactively but without reviving lapsed claims, for filing a civil action based on specified civil rights complaints under investigation by DFEH until:

1. DFEH files a civil action for the alleged violation; or

2. One year after DFEH issues written notice to a complainant that it has closed its investigation without electing to file a civil action for the alleged violation.

SB 807 also authorizes DFEH or counsel for a complainant to serve a verified complaint on the entity alleged to have committed the civil rights violation by any manner specified in the Code of Civil Procedure.

Moreover, SB 807 enables DFEH to bring an action to compel cooperation with its discovery demands in any county in which DFEH's investigation takes place, or in the county of the respondent's residence or principal office.

Further, SB 807 authorizes DFEH to bring a civil action to enforce the FEHA in any county where:

1. The unlawful practices are alleged to have been committed;

2. Records relevant to the alleged unlawful practices are maintained and administered;

3. The complainant would have worked or had access to public accommodation but for the alleged unlawful practice;

4. The defendant's residence or principal office is located; or

5. If the civil action includes class or group allegations on behalf of DFEH, in any county in the state.

SB 807 tolls the deadline for DFEH to file a civil action while a mandatory or voluntary dispute resolution is pending.

SB 807 clarifies that, for any employment discrimination complaint treated by DFEH as a class or group complaint, DFEH must issue a right-to-sue notice upon completion of its investigation, and not later than two years after the filing of the complaint.

(NOTES: SB 807 amends Sections 12930, 12946, 12960, 12961, 12962, 12963.5, 12965, 12981, and 12989.1 of the Government Code. Generally speaking, SB 807 gives the DFEH more power and flexibility in bringing enforcement actions.)

SB 331 – Expands Existing Restrictions Against Employment-Related Non-Disparagement Agreements, Non-Disclosure Clauses In Settlement Agreements.

In 2019, the Legislature adopted several laws that restricted the use of "non-disclosure" provisions in employment related agreements. Those existing restrictions prohibit any provision in a settlement agreement that prevent the disclosure of information related to claims regarding certain forms of sexual assault, sexual harassment, workplace harassment or discrimination based on sex, failure to prevent workplace harassment or discrimination based on sex, or retaliation for reporting workplace harassment or discrimination based on sex. Existing law also makes it unlawful for an employer, as a condition of continued or future employment, or in exchange for a raise or bonus, to sign a non-disparagement agreement or other document that purports to restrict the employee's right to disclose such information. SB 331 expands these provisions.

For settlement and severance agreements entered into on or after January 1, 2022, SB 331 expands the prohibition against non-disclosure and non-disparagement provisions to include acts of workplace harassment or discrimination not based on sex and acts of harassment or discrimination not based on sex by the owner of a housing accommodation. That is, the prohibition has been extended to harassment and discrimination based on other FEHA protected classes.

Under SB 331, a settlement agreement may not contain a provision that prevents or restricts disclosure of factual information related to a claim filed in a civil or administrative action regarding any form of discrimination based on protected classifications.

SB 331 also expands the restrictions on employment-related non-disparagement or non-disclosure agreements in several ways:

1. Such agreements are now unlawful to the extent it has the purpose or effect of denying an employee's right to disclose information about unlawful acts in the workplace, not only if the agreement actually purports to deny such rights.

2. Any contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace must include the following statement, or substantially similar language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

In addition, SB 331 prohibits an employer from including any provision that prohibits the disclosure of information about unlawful acts in the workplace in an agreement related to an employee's separation from employment, except in a negotiated settlement agreement to resolve an underlying claim filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process. For this exception to apply, the agreement must be voluntary, deliberate, and informed, the agreement must provide consideration of value to the employee, and the employee must be given notice and an opportunity to retain an attorney or be represented by an attorney.

(NOTE: SB 331 amends Section 1001 of the Code of Civil Procedure, and Section 12964.5 of the Government Code. SB 331's most significant provision, in our view, is the expansion of the State's prohibition of non-disparagement provisions in severance or settlement agreements beyond sexual harassment or discrimination based on sex/gender, i.e., the prohibition now extends to, harassment or discrimination based on FEHA's other protected classes.)

III. CASES

California Supreme Court Confirms Employee-Friendly Test For Evaluating Whistleblower Retaliation Claims.

***Lawson v. PPG Architectural Finishes, Inc.*, (2022) 12 Cal.5th 703**

Wallen Lawson worked as a territory manager for PPG Architectural Finishes, Inc. (PPG) -- a paint and coatings manufacturer -- from 2015 until he was fired in 2017. PPG used two metrics to evaluate Lawson's work performance: 1) his ability to meet sales goals; and 2) his scores on "market walks," which were sales calls during which PPG managers shadowed Lawson as he did his work. While Lawson received the highest possible score on his first market walk, his scores thereafter took a nosedive. He also frequently missed his monthly sales targets. In spring 2017, PPG placed Lawson on a performance improvement plan.

During this same time, Lawson alleged his direct supervisor began ordering him to intentionally mistint slow-selling PPG paint products, i.e., to tint the paint to a shade the customer had not ordered so PPG's retail customer would then be forced to sell the paint at a deep discount, enabling PPG to avoid buying back what would otherwise be excess unsold product. Lawson did not agree with his supervisor's mistinting plan, and therefore he filed two anonymous complaints with PPG's central ethics hotline. He also told his supervisor he refused to participate in mistinting. PPG investigated the issue and told the supervisor to discontinue the order. Yet, the supervisor continued to directly supervise Lawson and oversee his market walk evaluations. After Lawson failed to improve as outlined in his performance improvement plan, his supervisor recommended that he be fired. PPG then terminated Lawson's employment.

Lawson sued PPG. He alleged that PPG had fired him because he "blew the whistle" on his supervisor's mistinting order, in violation of Labor Code Section 1102.5. Section 1102.5 prohibits an employer from retaliating against an employee for disclosing information to a government agency or person with authority to investigate if the employee "has reasonable cause to believe" the information discloses a violation of a state or federal statute, rule, or regulation.

In considering PPG's motion for summary judgment, the district court applied the three-part burden-shifting framework the U.S. Supreme Court laid out in *McDonnell Douglas Corp. v. Green*. Under this framework, the employee must first establish a prima facie case of unlawful retaliation. Next, the employer must state a legitimate reason for taking the challenged adverse employment action. Finally, the burden shifts back to the employee to demonstrate that the employer's stated reason is actually a pretext for retaliation. The district court determined that Lawson could not satisfy the third step of this *McDonnell Douglas* test, and it entered judgment in favor of PPG on Lawson's whistleblower retaliation claim.

On appeal, Lawson argued that the district court was wrong to use the *McDonnell Douglas* framework. Instead, he contended that the court should have followed Labor Code Section 1102.6. Under Section 1102.6, Lawson only needed to show that his whistleblowing was a "contributing factor" in his dismissal. Section 1102.6 did not require Lawson to show that PPG's stated reason was pretextual. The Ninth Circuit asked the California Supreme Court to decide the issue.

The California Supreme Court clarified that Labor Code Section 1102.6, and not *McDonnell Douglas*, is the framework for litigating whistleblower claims under Labor Code Section 1102.5. After all, Labor Code Section 1102.6 describes the standards and burdens of proof for both parties in a Labor Code Section 1102.5 retaliation case. First, the employee must demonstrate "by a preponderance of the evidence" that the employee's protected whistleblowing was a "contributing factor" to an adverse employment action. Second, once the employee has made that showing, the employer has to prove by "clear and convincing evidence" that the alleged adverse employment action would have occurred for legitimate, independent reasons, even if the employee was not involved in protected whistleblowing activities.

The Court noted that other courts addressing burden-shifting frameworks similar to Section 1102.6 have found the *McDonnell Douglas* framework to be inapplicable. For instance, nearly all courts to address the issue have concluded that *McDonnell Douglas* does not apply to First Amendment retaliation claims, or to federal statutes that are similar to Labor Code Section 1102.6.

Finally, the Court found that there was no reason why Labor Code Section 1102.5 would require employees to prove that any of the employer's proffered legitimate reasons were pretextual. This is because Section 1102.5 prohibits employers from considering the employee's protected whistleblowing as any "contributing factor" to an adverse employment action. Requiring an employee to also prove the falsity of any potentially legitimate reasons the employer may have had for an adverse employment action would be inconsistent with the Legislature's intent to encourage reporting of wrongdoing.

(*NOTE: The California Supreme Court's decision will make it easier for plaintiffs to avoid summary judgement and pursue Labor Code section 1102.5 "whistleblower retaliation" claims. In our practice, we have seen an uptick in whistleblower claims and in light of this decision California employers will likely see more of these claims.)*

The Time To File A Failure-To-Promote Claim Begins When The Employee Knows Or Should Know Of The Decision To Promote Another.

***Pollock v. Tri-Modal Distribution Servs., Inc.*, (2021) 11 Cal.5th 918**

Pamela Pollock is a customer service representative at Tri-Modal Distribution Services, Inc. (Tri-Modal), a freight shipping company. In 2014, Tri-Modal's executive vice-president, Michael Kelso, initiated a dating relationship with Pollock. While Kelso wanted the relationship to become sexual, Pollock did not, so she ended the relationship in 2016. Subsequently, Pollock alleged that Tri-Modal and Kelso denied her a series of promotions, even though she was the most qualified candidate, and that her refusal to have sex with Kelso was the reason.

On April 18, 2018, Pollock filed an administrative complaint with California's Department of Fair Employment and Housing (DFEH) alleging quid pro quo sexual harassment in violation of the Fair Employment and Housing Act (FEHA). In her DFEH complaint, Pollock challenged the promotion of Leticia Gonzalez, among others. As relevant to this appeal, Tri-Modal offered, and Gonzalez accepted, a promotion in March 2017 and the promotion took effect on May 1, 2017. There was no evidence as to whether or when Tri-Modal notified Pollock that she did not receive the promotion. There was also no evidence that Pollock knew or had reason to know that Gonzalez was offered the promotion and accepted it in March 2017.

At the time, Pollock filed her DFEH complaint, the FEHA required employees seeking relief to file an administrative complaint with the DFEH within one year "from the date upon which the alleged unlawful practice . . . occurred." Pollock argued her failure to be promoted occurred on the May 1, 2017 date that Gonzalez began her promotion, so her April 2018 administrative complaint was timely. Tri-Modal and Kelso argued, however, that its failure to promote Pollock "occurred" in March 2017 when Gonzalez accepted promotion, so Pollock filed her complaint too late.

The trial court concluded that the failure to promote occurred in March 2017 when Gonzalez was offered and accepted the promotion. Thus, the trial court found that Pollock's claim was time-barred, and the Court of Appeal agreed. The Court of Appeal then awarded costs on appeal to all of the defendants. However, the court did not address whether Pollock's underlying claim was "frivolous, unreasonable, or groundless when brought" or that she "continued to litigate after it clearly became so." After Pollock petitioned for a rehearing on the award of costs and the Court of Appeal denied her petition, the California Supreme Court granted review.

The California Supreme Court held that for a FEHA failure to promote claim, the statute of limitations to file a DFEH complaint begins to run when an employee knows or reasonably

should know of the employer's refusal to promote the employee. Although there was no evidence in this case when Pollack knew of Gonzalez' promotion, Pollack's legal papers in opposition to Kelso's motion for summary judgment did not dispute that Gonzalez was offered and accepted the promotion in March 2017.

In addition, the Court held that the FEHA's directive that a prevailing FEHA defendant "shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigation after it clearly became so" also applies to an award of costs on appeal. The Court concluded the Court of Appeal erred in awarding costs on appeal to Tri-Modal and Kelso without first finding whether Pollock's underlying claim was objectively groundless.

(NOTE: This decision brings some needed clarity to when an employee's failure to promote claim begins running for the purpose of a failure to promote claim under the FEHA. Employers should be counseled to provide some type of notice to non-selected candidates to establish proof that the employee knew or should have known that another candidate received the promotion in question.)

Ninth Circuit Addresses How First Amendment Rights Impact an Agency's Ability To Discipline A Law Enforcement Officer For A Social Media Post

***Moser v. Las Vegas Metropolitan Police Department* (9th Cir. 2021) 984 F.3d 900**

In 2015, an individual shot a police officer with the Las Vegas Metropolitan Police Department (Department). Department officers later found and arrested that suspect. Upon seeing news of the suspect's capture, Charles Moser, a SWAT sniper with the Department, commented the following on a friend's Facebook post about the shooting: "It's a shame he [the suspect] didn't have a few holes in him[.]" Moser made the comment through his personal Facebook profile while off-duty at home.

An anonymous tip notified the Department of Moser's comment, prompting an internal investigation wherein Moser admitted his comment was inappropriate, but explained that he was expressing frustration that the suspect ambushed and shot one of the Department's officers. Moser also removed the comment from social media approximately three months after posting it. Based on the investigation's findings, Moser was transferred out of SWAT and placed back on patrol out of concern that his comment indicated he had become "a little callous to killing." Upon his dismissal from the SWAT team, Moser sued the Department, alleging violation of his free speech right under the First Amendment.

The district court granted summary judgment for the Department, holding that the government's interest in employee discipline outweighed Moser's First Amendment right under the applicable balancing test for speech by government employees. Moser appealed, and the Ninth Circuit reversed the district court's grant of summary judgment.

The Ninth Circuit first identified the framework for considering the First Amendment rights of government employees. An employee must first establish: (i) he spoke on a matter of public concern; (ii) he spoke as a private citizen rather than a public employee; and (iii) the relevant speech was a substantial or motivating factor in the adverse employment action. Once this is established, the burden then shifts to the government to show that it: (iv) had an adequate justification for treating the employee differently than other members of the general public; or (v) it would have taken the adverse employment action even absent the protected speech. If the employer cannot meet this burden, then the employee's speech is protected under the First Amendment.

On appeal, Moser and the Department only disputed the fourth factor of this test, which requires courts to balance the First Amendment rights of the employee against the government's administrative interest in avoiding disruption and maintaining workforce discipline. As part of this balancing test, the Ninth Circuit noted that courts may consider the content of a government employee's speech to determine how much weight to give the employee's free speech interests. However, the Ninth Circuit held that it could not balance Moser's First Amendment interests against the Department's administrative interests due to two factual disputes.

First, the Ninth Circuit held a factual dispute existed as to the meaning of Moser's Facebook comment. The Department alleged Moser's comment objectively advocated for unlawful violence by law enforcement, and therefore, is not at the core of First Amendment protection. In contrast, Moser contended that his comment merely expressed frustration at the dangers law enforcement officers face in the line of duty, which should receive higher First Amendment protection.

Second, the Ninth Circuit held another factual dispute existed regarding whether Moser's Facebook comment would cause disruption to the Department. The Ninth Circuit noted that the Department failed to provide enough evidence to support its prediction that the comment would cause disruption in the workplace because there was no evidence that anyone knew about the post other than the individual who anonymously notified the Department of the comment. The Court also noted that there was little chance the public would have seen the comment because Moser deleted it.

Based on these two factual disputes, the Ninth Circuit held that the district court erred in granting summary judgment to the Department and remanded the case to the district court.

(NOTE: Public employers have been forced to navigate difficult issues such as those addressed in Moser given the increased prevalence of employees on social media. The Ninth Circuit's decision provides guidance on the burden public employers will have to meet if they are inclined to take disciplinary action against a public employee's speech. Social media posts are often ambiguous and on controversial subjects, and therefore public employers should carefully evaluate these situations when they occur).

Allegedly Racist Comments made by an Outside Presenter at a Business meeting may be Actionable.

***Smith v. BP Lubricants USA Inc.*, (2021) 64 Cal.App.5th 138 (2021).**

An African American employee brought action against company and company representative alleging representative made several comments to the employee during presentation of company product that he considered racist and offensive in violation of the Fair Employment and Housing Act (FEHA) and the Unruh Act, and alleging a claim against representative for intentional infliction of emotional distress (IIED).

Smith, who is African American, worked for Jiffy Lube for almost two decades. Smith alleges Jiffy Lube harassed and discriminated against him because he is African-American. In September 2017, Jiffy Lube "held a company presentation to discuss and teach employees about a new product from Castrol." Outside presenter (Pumarol- employed by BP) made comments like: "You sound like Barry White" and "I don't like taking my car to Jiffy Lube because I've had a bad experience with a mechanic putting his hands all over my car. How would you like Barry White over there with his big banana hands working on your car?"

The court rejected BP and Pumarol's argument that they cannot be liable under FEHA because they were never Smith's employer. FEHA prohibits "any person" from aiding or abetting workplace discrimination. For that reason, individuals and entities who are not the plaintiff's employer may be liable under FEHA for aiding and abetting the plaintiff employer's violation of FEHA. Thus, BP and Pumarol are liable under FEHA for aiding and abetting Jiffy Lube's alleged harassment and discrimination against Smith only if (1) Jiffy Lube subjected Smith to discrimination and harassment, (2) BP and Pumarol knew that Jiffy Lube's conduct violated FEHA, and (3) BP and Pumarol gave Jiffy Lube "substantial assistance or encouragement" to violate FEHA.

(NOTE: This case highlights the expansive reach of the FEHA. While aiding and abetting liability is an uncommon theory and more difficult to prove, public agencies should assure that their employees are trained that discriminatory and harassing conduct perpetrate against even third parties is prohibited while acting on behalf of the employer.)

Stray Remark That Assistant Dean "Wanted Someone Younger" Tanks Employer's Motion.
***Jorgensen v. Loyola Marymount Univ.* (2021) 68 Cal.App.5th 882**

Linda Jorgensen started working at Loyola Marymount University (University) in 1994. In July 2010, the University appointed Stephen Ujlaki to be the Dean of its School of Film and Television (School). At the time, Jorgensen was over 40 years old.

In 2014, Ujlaki promoted Johana Hernandez to be an Assistant Dean. Hernandez was 30 years old, and she had begun work at the School four years earlier as an administrative assistant. Jorgensen helped train Hernandez, and claimed that Ujlaki "made Hernandez his favorite." Jorgensen alleged she was far more qualified and experienced for the Assistant Dean position than Hernandez. In a particularly insensitive decision, Ujlaki ordered Jorgensen to report to Hernandez.

Jorgensen further claimed that after Hernandez was promoted, Ujlaki and Hernandez sidelined her and left her with few duties. Jorgensen attributed her lost promotion and marginalization to age and gender discrimination. Jorgensen complained to the University, but it rejected her claims. Jorgensen then alleged she was punished for her complaint. Jorgensen sued the University in 2018 and resigned in 2019.

In the trial court, the University contended that Jorgensen was a problem employee who became insubordinate when Ujlaki and his team tried to improve the way the School operated. One Associate Dean – a woman older than Jorgensen – described Jorgensen as the "the most difficult employee I have ever had to manage by orders of magnitude." The University also presented facts that Hernandez's promotion was due to her competence, not age discrimination.

The University moved for summary judgment, arguing that the lawsuit had no merit. The trial court excluded from evidence a sworn statement from Carolyn Bauer, a former School employee. Bauer declared that while she was working at the School, a person expressed interest in another position that was unrelated to the Assistant Dean position Jorgensen sought. According to Bauer's statement, when Bauer told Hernandez about the person's interest in the other position, Hernandez responded she "wanted someone younger". Without this evidence, the trial court found for the University. Jorgensen appealed.

The Court of Appeal concluded that the trial court was wrong to excluded Bauer's sworn statement. Under California precedent, even a non-decision maker's age-based remark "may be relevant, circumstantial evidence of discrimination." Thus, even though Hernandez and not Ujlaki made this age-related remark about another position, the remark was relevant because it showed Hernandez could influence Ujlaki, the School's top decision maker, on all issues

including hiring and promotion. The court noted that Ujlaki invited Hernandez to participate in the interviews for Assistant Dean positions and that they discussed hiring decisions. In addition, Ujlaki gave Hernandez a series of special assignments that flouted formal organization lines. Thus, a jury could reasonably conclude Hernandez could influence Ujlaki's decisions. The trial court erred in excluding Bauer's statement because Bauer quoted Hernandez word-for-word and Hernandez's remark explicitly described her state of mind.

The Court of Appeal next considered whether Hernandez's remark would have changed the trial court's analysis. In a discrimination case, the employee must first establish a prima facie case, in order to raise a presumption of discrimination. Second, the employer may rebut that presumption by showing it acted for legitimate and nondiscriminatory reasons. Finally, the employee may attack the employer's legitimate reasons as pretextual or offer other evidence of improper motives.

Here, the Court of Appeal concluded Hernandez's remark would have changed the trial court's analysis. Hernandez's remark she wanted someone younger was unambiguous. Also, there was evidence that: Ujlaki created a pay differential between male and female Associate Deans hired concurrently; and Hernandez was an influential advisor to Ujlaki. People other than Jorgensen were also critical of Ujlaki's leadership. An outside consultant also evaluated Ujlaki's deanship and concluded the faculty consensus was the situation was "too dysfunctional to be allowed to continue." Taking all this evidence into account, the appellate court held that the trial court improperly decided in the University's favor. The court remanded the case for further proceedings.

(NOTE: This case demonstrates how difficult it is to prevail on a motion for summary judgement in a FEHA discrimination (or retaliation) lawsuit. Because there is rarely direct evidence of discriminatory (or retaliatory) motive, courts are willing to accept indirect or circumstantial evidence of discriminatory motive, even in circumstances where the trier-of-fact needs to "connect the dots" to establish causation. Here, a non-decisionmaker's arguably stray comments created a dispute of fact as to whether the decisionmaker's decisions were tainted by the non-decisionmaker's discriminatory animus because the plaintiff was able to establish that the non-decisionmaker had significant influence in the decision-making process at issue).

Agency Unlawfully Terminated Peace Officer After He Returned From Leave.

***Vincent v. Department of the California Highway Patrol,* 2021 WL 3878390 (Cal. Ct. App. Aug. 31, 2021), unpublished.**

In 2006, the Department of the California Highway Patrol (CHP) hired Stanley Vincent as a peace officer. Vincent, a native of Haiti, stood in loco parentis to his sister, who had paranoid schizophrenia. Vincent regularly traveled to Haiti to help with her care. In 2007 and 2010, Vincent took emergency leave from his CHP duties to care for his sister. On those occasions, CHP did not require him to fill out any forms prior to traveling for these emergencies, nor did it require him to provide any medical certifications.

On November 9, 2014, Haitian law enforcement informed Vincent that his sister had left the family home and was wandering the streets of Port-au-Prince. Vincent informed CHP Sergeant Eric Martinez that he might need to take an emergency leave of absence. The next day, Vincent told Sergeant Brian DeMattia that his sister was missing in Haiti, and requested a two-week leave of absence. Sergeant DeMattia notified Captain Mark D'Arelli that Vincent needed to leave the country to attend to family matters.

On November 11, 2014, Vincent left for Haiti. Over the next three days, two sergeants attempted to contact Vincent about his absence. One of the sergeants requested that Vincent come into the office to determine whether his request met CHP's family leave criteria. Vincent did not respond to these messages.

On November 14, 2014, CHP labelled Vincent absent without leave (AWOL) when he failed to show for work. Six days later, Captain D'Arelli directed CHP to initiate an investigation into Vincent's AWOL status. On November 25, 2014, Vincent contacted Lieutenant Mike Bueno from Haiti and requested an additional eight days of emergency leave. Lieutenant Bueno ordered Vincent to return to work immediately.

On December 4, 2014, Vincent returned to work and submitted documentation about his leave, including medical and financial documents that showed his support for his sister. CHP refused to accept or evaluate the documents, and opened an investigation into "possible adverse action issues" for being AWOL. CHP later expanded the scope of the investigation to include charges of dishonesty and mishandling of evidence based on misdated booking forms. CHP's investigation substantiated all charges against Vincent, but failed to mention that Vincent had requested family care leave before departing for Haiti. Based on the investigation's findings, Commissioner Joseph Farrow terminated Vincent.

Vincent sued CHP for wrongful termination, and violations of the California Family Rights Act (CFRA) and Fair Employment and Housing Act (FEHA). After Vincent prevailed at trial, CHP filed motions for judgment notwithstanding the verdict and a new trial. The trial court denied these motions, and CHP appealed. On appeal, CHP alleged that Vincent was ineligible for CFRA leave because he did not stand in loco parentis to his sister. The Court of Appeal disagreed, finding that the evidence showed that Vincent provided for his sister, including financially, on a day-to-day basis for nearly two decades.

CHP further alleged that Vincent failed to notify CHP of his in loco parentis claim. The Court of Appeal disagreed, citing to Vincent's notice to Sergeant DeMattia about his family situation before he left for Haiti. Sergeant DeMattia, in turn, informed Captain D'Arelli of Vincent's family's situation. The Court of Appeal also found that any lack of notice to CHP was the result of CHP's failures to follow CFRA regulations and ask Vincent for more information about his parental relationship to his sister. CHP also alleged that Vincent failed to provide CHP with the requisite medical certification for his CFRA leave. Again, the Court of Appeal disagreed, citing to medical documentation that Vincent provided upon his return from Haiti that CHP refused to accept or evaluate.

Lastly, CHP alleged that Vincent's FEHA claim failed because he did not provide sufficient evidence that CHP intentionally retaliated against him for taking protected leave. The Court of Appeal disagreed. The jury had seen that the CHP's investigation omitted the fact that Vincent requested emergency leave before leaving for Haiti. The Court found that this deliberate concealment supported the jury's determination that CHP possessed retaliatory intent when it fired Vincent.

The Court of Appeal found that substantial evidence supported the jury's determination that Vincent proved his CFRA and FEHA claims.

(NOTE: Although unpublished, this case demonstrates the danger of taking disciplinary or other punitive action against an employee in circumstances where the employee's performance deficiencies are directly or indirectly tied to a leave of absence (e.g., absenteeism). California law recognizes a number of different "protected leaves," from CFRA leave to domestic violence victim leave to jury leave, etc., and employer's failure to recognize that it must excuse performance issues tied to those leaves can lead to liability like the jury found here.)

Terminated RN Could Not Show Hospital's Reasons for Her Discharge Were Pretextual.
***Wilkin v. Cmty. Hosp. of the Monterey Peninsula* (2021) 71 Cal.App.5th 806**

Kimberly Wilkin began working at the Community Hospital of the Monterey Peninsula (Hospital) as a registered nurse in 2005.

In November 2016, Wilkin received a written disciplinary notice for poor attendance after receiving three courtesy warnings that she could be disciplined if her attendance did not improve. Over the next 14 months, Wilkin's attendance continued to be poor. While Wilkin requested and received intermittent family leave under the Family and Medical Leave Act ("FMLA") and other medical leave during this time, her absences exceeded the frequency of FMLA-protected intermittent leave that her healthcare provider had estimated. Wilkin was repeatedly counseled that her attendance issues could result in her termination.

In November 2017, a director was asked to investigate whether a patient received medication without supporting documentation, in violation of Hospital policy. The director found that Wilkin had failed to properly document her handling and administration of Narcan to the patient. During her investigation, the director found numerous incidents when Wilkin signed off on the administration of medication, including controlled substances, but failed to properly document each administration. For example, Wilkin used a system override function to pull syringes of morphine, some without a written physician's order, and failed to document how much, if any, was either given to the patient or discarded.

The director subsequently terminated Wilkin's employment in late December for failure to accurately document her handling and administration of controlled substances and ongoing attendance issues. However, after Wilkin requested a reasonable accommodation in the form of a medical leave of absence, the Hospital determined that Wilkin would not be immediately discharged. After further investigation, on January 16, 2018, Wilkin received written notice she was being terminated. That day, the Hospital also filed a complaint with the Board of Registered Nursing regarding Wilkin's handling and administration of controlled substances.

Wilkins then sued the Hospital, alleging her discharge constituted disability discrimination, retaliation, and otherwise violated the Fair Employment and Housing Act (FEHA); resulted in the unlawful denial of medical leave and violation of the California Family Rights Act (CFRA) and the FMLA; and was a wrongful termination in violation of public policy. The trial court granted the Hospital's motion for summary judgement, principally on the grounds that Wilkin did not produce any evidence showing the Hospital fabricated its reasons for her termination.

Wilkin appealed, and the California Court of Appeal affirmed the trial court. California courts use a three-stage burden-shifting test to analyze FEHA discrimination and retaliation claims. Under this test, the employee must first establish the essential elements of the claims. If the employee can do so, the burden shifts back to the employer to show that the allegedly discriminatory or retaliatory action was taken for a legitimate, non-discriminatory and non-retaliatory reason. If the employer meets this burden, the presumption of discrimination or retaliation disappears and the employee then has the opportunity to attack the employer's legitimate reason as pretextual.

The court found that the Hospital produced evidence that it terminated Wilkin's employment because she: 1) repeatedly failed to properly document the administration of patient medication and the discarding of unused medication; and 2) was chronically absent over the prior 14 months.

At Wilkin's deposition, for example, she admitted that she had failed to comply with the Hospital's drug handling policy and she acknowledged she had administered a drug to a patient for nearly an hour before she retrieved the drug from the medication dispensing machine. In addition, the Hospital produced evidence of Wilkin's long history of attendance problems including disciplinary notices issued in November 2016, December 2016, February 2017; meetings in September and November 2017 to discuss the ongoing concerns; and many warnings to improve her attendance. Thus, the court found the Hospital met its burden of presenting non-discriminatory and non-retaliatory reasons for Wilkin's termination.

Further, the court concluded that Wilkin failed to present any evidence that the Hospital's stated reasons for terminating her employment were either false or pretextual as required under the burden-shifting framework. It was undisputed Wilkin had attendance issues unrelated to any disability or health condition, and that she violated the Hospital's policy regarding the documentation and handling of patient medication. The court rejected each of Wilkin's arguments to the contrary. The Hospital never denied Wilkin's FMLA leave; it corrected any mistakes it discovered in Wilkin's timekeeping records; and the director met with Wilkin to discuss the documentation issues before terminating her employment. For these reasons, the court concluded that the trial court properly granted summary judgment to the Hospital on Wilkin's discrimination and retaliation claims.

The Court also affirmed the trial court's ruling with respect to Wilkin's other claims. Specifically, it found she could not maintain claims for failure to accommodate or failure to engage in the interactive process because requesting that she be placed on a medical leave of absence instead of being discharged for violation of the Hospital's policies does not qualify as a reasonable accommodation under California law. Further, because the court found in the

Hospital's favor regarding her discrimination and retaliation claims, Wilkin could not establish a "failure to prevent" cause of action. This was because under existing case law an employer cannot be liable for failure to prevent discrimination or harassment if the plaintiff cannot prove he or she was discriminated or harassed in the first place.

Finally, the court held that Wilkin failed to offer sufficient evidence to establish that the Hospital's decision to discipline her and terminate her employment was because of her CFRA and/or FMLA leave.

(NOTE: While motions for summary judgment in FEHA cases are difficult to employer's to win, employers can prevail if they have strong evidence to support the legitimacy of the business reasons for the disputed adverse employment action. Here, the Hospital was able to prevail because the nurse's performance deficiencies were objectively below the standard of care. The serious consequences caused by the performance deficiencies also likely make it more likely that that courts accepted the legitimacy of the Hospital's proffered reasons for the termination of the plaintiff's employment.)

MOU Provision Authorized Charter County To Recover Overpayments From Employees.
Association for Los Angeles Deputy Sheriffs v. County of Los Angeles **(2021) 60 Cal.App.5th 327**

The Association for Los Angeles Deputy Sheriffs (ALADS) is the union representing sworn non-management peace officers employed by the Los Angeles County (County) Sheriff's Department (Department). The memorandum of understanding (MOU) between ALADS and the County includes provisions that address "Paycheck Errors," including overpayments and underpayments.

The MOU provision on overpayments states that "employees will be notified prior to the recovery of overpayments." Further, "recovery of more than 15% of net pay will be subject to a repayment schedule established by the appointing authority under guidelines issued by the Auditor-Controller. Such recovery shall not exceed 15% per month of disposable earnings (as defined by State law), except, however, that a mutually agreed-upon acceleration provision may permit faster recovery."

In April 2012, during a conversion to a new payroll system, the County failed to apply an agreed-upon cap to certain bonus payments. The error resulted in salary overpayments to 107 deputies.

In May 2017, the County sent letters to these deputies, informing them of the overpayment, and giving them two repayment options: remit the payment in full, or repay the amount through payroll deductions at a specified rate. In April 2018, the County sent the deputies letters stating it would deduct the overpayments as described in the prior letters.

In May 2018, the County began the paycheck deductions. Thereafter, ALADS filed grievances on behalf of the affected employees, challenging the deductions from their paychecks to recover the overpayment amounts.

While the parties addressed the grievances through the County's administrative procedures, ALADS also went to court. ALADS sought a writ of mandate and declaration that an overpayment provision of the MOU between ALADS and the County was unenforceable because it violated wage garnishment law and the Labor Code. Specifically, ALADS alleged the deductions violated Labor Code Section 221, which makes it unlawful "for any employer to collect or receive from an employee any part of wages" paid to the employee. ALADS alleged that the wage garnishment law provided the exclusive procedure for withholding an employee's earnings.

The County demurred to the writ of mandate on multiple grounds, including that ALADS failed to exhaust administrative remedies, and that neither Labor Code Section 221 nor wage garnishment law applied to the County. The trial court granted the demurrer solely on the ground that ALADS failed to exhaust administrative remedies. ALADS appealed, and the Court of Appeal affirmed the trial court's ruling, but on the grounds that Labor Code Section 221 and the wage garnishment laws do not prevent a charter county from agreeing to MOU provisions regarding the recovery of overpayments.

The union argued it was not required to exhaust administrative remedies because the available administrative remedy would be futile since it would require all 107 deputies to bring individual grievances addressing the same issue: namely, the County's ability to recover overpayments under the MOU. The Court of Appeal agreed, holding that the administrative remedy was inadequate because it would not provide "classwide" relief for the 107 deputies.

However, the County argued that ALADS could not state a valid claim because of the home rule doctrine, which gives charter counties like the County the exclusive right to regulate matters relating to its employees' compensation. The Court of Appeal agreed and held the recovery of overpayments pursuant to a MOU was within the authority of a charter county as part of its exclusive right to regulate compensation. For similar reasons, the Court of Appeal noted that wage garnishment law did not prohibit the County from recouping overpayments.

(NOTE: Whether or not a city is a general law or charter city is an important factor that is sometimes overlooked by practitioners defending public agencies in litigation. With respect to wage and hour matters in particular, practitioners should evaluate whether or not the defendant city is a charter or general law city).

Retirees Had No Vested Right To Health Insurance Benefits Under County Retirement Plan.
***Harris v. Cty. of Orange* (9th Cir. 2021) 17 F.4th 849**

In January 1993, the County of Orange and the Orange County Employee Retirement System (OCERS) entered into a memorandum of understanding (MOU). That MOU allowed the County to access surplus investment earnings controlled by OCERS and to deposit a portion of the surplus into an Additional Retirement Benefit Account (ARBA) to pay for health insurance of present and future County employees. In April 1993, the County adopted the Retiree Medical Plan, funded by investment earnings from the ARBA account and mandatory employee deductions. The Retiree Medical Plan explicitly stated that the plan did not create any vested rights to benefits. The County's intent was to induce employees to retire early.

Labor unions then entered into MOUs with the County providing that the County would administer a Retiree Medical Insurance Plan and retirees would receive a Retiree Medical Insurance Grant. As a result, County employees received a monthly grant to defray the cost of health care premiums from 1993 through 2007. However, beginning in 2004, the County negotiated with its labor unions to restructure the retiree medical program, which was underfunded. The County ultimately approved an agreement with the unions that reduced benefits for retirees.

A group of County retirees then filed a class action complaint alleging, among other claims, that the County intended in the 1993 MOU to create an implied vested right to the monthly grant, and then breached that MOU by reducing the benefit in 2004. The district court granted judgment in the County's favor, and retirees appealed. The case made its way to the Ninth Circuit.

First, the Ninth Circuit held that the April 1993 Retiree Medical Plan did not create any vested right to the monthly grant benefits. Under California precedent, a person bears a "heavy burden" to overcome the presumption that the legislature did not intend to create vested rights. The evidence of a vested implied right in an ordinance or resolution must be "unmistakable." Since the April 1993 Retiree Medical Plan explicitly said that the plan did not create any vested right to the benefit, the retirees' claim to an implied vested right was foreclosed.

Next, the Ninth Circuit rejected the retirees' argument that the MOUs contained a contradictory implied term. The court held that at the summary judgment stage, the County provided evidence that the Retiree Medical Plan was adopted by resolution and therefore became governing law with respect to the monthly grant benefits. As existing County law, the Retiree Medical Plan became part of the MOUs, which were of limited duration and expired on their own terms by a specific date. Absent express language that the monthly grant benefits vested, the right to the benefits expired when the MOUs expired.

Moreover, the Ninth Circuit disagreed with retirees' argument that the plan was void because the County drafted and imposed the anti-vesting provisions in the Retiree Medical Plan without collective bargaining. As a preliminary matter, the court held that any claim the Retiree Medical Plan was void based on a failure to bargain was barred under the three-year statute of limitations in effect at that time for unfair practice charges. In any event, the Ninth Circuit further held that the Retiree Medical Plan was not unilaterally imposed on the unions and their employees without collective bargaining because the unions had the option to reject the plan or to negotiate different terms. Instead, the unions signed the MOUs that adopted the Retiree Medical Plan. Thus, the process was consistent with the Meyers-Milias Brown Act.

Finally, the Ninth Circuit concluded that the monthly grant benefits were not deferred compensation, which would vest upon retirement like pension benefits. The court reasoned that the Retiree Medical Plan did not provide insurance benefits, but rather it provided the opportunity for employees to purchase health insurance at a reduced cost. Unlike deferred compensation, which is earned by merely accepting employment, access to the health benefit required the employee to choose to pay his portion of the health insurance premium.

For these reasons, the Ninth Circuit affirmed the district court's decision in favor of the County.

(NOTE: This case reaffirms the principle that rights provided to employees and/or retirees through collective bargaining will not be deemed to be "vested," i.e., irrevocable, unless there is a clear and "unmistakable" intent to bind the city that way. Those who assist their city with collective bargaining must take care to ensure that benefits negotiated into an MOU will not inadvertently be deemed to be "vested" upon a court challenge.)

Retiree Forfeited Part of Pension Because Of Criminal Conduct

Wilmot v. Contra Costa County Employees' Retirement Association **(2021) 60 Cal.App.5th 631**

In December 2012, Jon Wilmot, an employee with the Contra Costa County Fire Protection District, submitted his application for retirement to the County's retirement authority, the Contra Costa County Employees' Retirement Association (CCERA), established in accordance with the County Employees Retirement Law of 1937 (CERL). On January 1, 2013, the California Public Employees' Pension Reform Act of 2013 (PEPRA) took effect, which included a provision mandating the forfeiture of pension benefits/payments if a public employee is convicted of "any felony under state or federal law for conduct arising out of or in the performance of his or her official duties."

In February 2013, Wilmot was indicted for stealing County property. In April 2013, CCERA approved Wilmot's retirement application, fixing his actual retirement on the day he submitted his application in December 2012. Also in April 2013, Wilmot began receiving monthly pension checks. In December 2015, Wilmot pled guilty to embezzling County property over a 13-year period ending in December 2012. Thereafter, the CCERA reduced Wilmot's monthly check in accordance with PEPRA's forfeiture provision.

Wilmot petitioned for a writ of traditional mandate and declaratory relief. He argued that the CCERA's application of the PEPRA's felony forfeiture provision was improper because the statute does not apply retroactively to persons who retired prior to PEPRA's effective date. The trial court disagreed, holding that the CCERA properly applied the forfeiture provision to Wilmot's pension.

Wilmot appealed, and the Court of Appeal affirmed the trial court's decision. On appeal, Wilmot argued when PEPRA took effect in January 2013, he was no longer a "public employee" because he worked his final day and submitted his retirement paperwork in December 2012. The Court of Appeal disagreed, stating that an employee's retirement application is pending until approved by a retirement board under the CERL. When PEPRA took effect, Wilmot's application was submitted, but CCERA did not approve his application until April 2013. Thus, he was subject to PEPRA's forfeiture provision.

Wilmot also argued he was improperly being "divested" of his vested pension benefits. Again, the Court of Appeal disagreed. Relying on the Court of Appeal's pervious decision in *Marin Association of Public Employees v. Marin County Employees' Retirement Association*, the Court of Appeal confirmed that anticipated pension benefits are subject to reasonable

modifications and changes before the pension becomes payable and that an employee does not have a right to any fixed or definite benefits until that time.

Next, Wilmot argued that application of the forfeiture provision "impaired the obligation" of his employment contract with the Contra Costa County. The Court of Appeal rejected that argument because his supposed employment contract was prohibited by the California Constitution's contract clause. The Court of Appeal acknowledged that to be constitutional under the contract clause, modification of public pension plans must relate to the operation of the plan and intend to improve its function or adjust to changing conditions. Relying on the Supreme Court's decision in *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* and the Court of Appeal's decision in *Hipsher v. Los Angeles County Employees Retirement Association*, the Court of Appeal noted that one of the primary objectives in providing pensions to public employees is to induce competent persons to remain in public employment and render faithful service. Therefore, withholding that inducement if an employee's performance is not faithful (such as with Wilmont - who pled guilty to embezzling County property for 13 years) is a logical and proper response to improve the function of a public pension plan.

Finally, Wilmot argued applying the PEPRA's forfeiture provision was an unconstitutional *ex post facto* law -- meaning a law that only makes an act illegal or that increases the penalties for an infraction after the act has been committed. The Court of Appeal disagreed, holding the forfeiture provision is a civil remedial measure, not a criminal penalty, and does not improperly increase the penalty for Wilmot's misconduct. Rather, the forfeiture provision merely takes back from Wilmot what he never rightfully earned in the first place due to his failure to faithfully perform in public service.

For all these reasons, the Court of Appeal determined that the CCERA properly applied the PEPRA's forfeiture provision to Wilmot because of his admitted criminal conduct during his employment.

(NOTE: This case demonstrates that challenges to PEPRA's forfeiture provisions will be difficult for a public employee to make. As long as the employee's retirement application was granted before the effective date of PEPRA, a forfeiture should withstand a judicial challenge.)