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AB 955 Reverses Damage Done to the POBR by *Mays v. City of Los Angeles*

By Jason Jasmine

Last year, we reported on a disturbing decision by the California Supreme Court, which concluded that notices under Government Code section 3304(d) of the POBR must simply provide that the public agency has decided that it might take some type of disciplinary action against the officer for certain specified misconduct. *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313. This decision overturned many years of precedent and clearly held that public agencies are not required to put peace officers on notice of the level of discipline to be imposed, within one year of discovery. Rather, all that was required within that year was that peace officers must be informed that some level of discipline might be imposed.

AB 955, which becomes law on January 1, 2010, was enacted in direct response to the *Mays* decision, and seeks to clarify the Legislature's original intent that in order to comply with Government Code section 3304(d), an officer must be notified by a Letter of Intent articulating the proposed discipline, or Notice of Adverse Action, prior to the running of the one-year statute of limitations.

Note that AB 955 does not affect the cases discussed on pages 6 and 8, which involve tolling of the statute of limitations.

Gary Messing Honored as "Superb" Labor Lawyer in Sacramento

After being selected for 2010 in Northern California Super Lawyers (top 5%), Best Lawyers America (top 1%-2%) and Best of the U.S. (top 1%-2%), Gary was ranked in the top four labor and employment lawyers in the Sacramento area in the AVVO rankings. Out of the 890 lawyers who practice labor and

employment law in the greater Sacramento area, Gary was one of only four who received a rating of "superb".

CBM Tentatively Prevails In Fight To Increase The Value Of "Cashed-Out" Accumulated Leave Credits For CDF Firefighters

Government Code section 19839 requires the State to cash out accumulated leave credits in an amount equal to what an employee would have been paid had he/she used his/her leave credits while still employed. Currently, the State calculates the worth of State Bargaining Unit 8 ("BU8") members accumulated leave credits as if they work a 40-hour work week even though the vast majority of BU8 members work a 72-hour duty week. BU8 is represented by CDF Firefighters ("CDFF"), and at CDFF's request, CBM filed a lawsuit on behalf of BU8 alleging that because BU8 members work planned overtime as part of their regular schedule, and are compensated as if they worked planned overtime when they use leave credits while employed, the State must include planned overtime when calculating the worth of BU8 accumulated leave credits when a member separates from service. This case is being handled primarily by CBM partner **Gregg Adam** and CBM associate **Jennifer Stoughton** in San Francisco, and CBM partner **Gary Messing** in Sacramento.

It is estimated that this benefit is worth over $10 million to CDFF-represented employees. The Court has tentatively ruled in our favor on the merits of the case and the case has been certified as a class action for all current and former BU8 employees who retired on or after August 20, 2006. We hope to have a final decision in December.

CBM Challenges The Elimination Of The Rural Health Care Subsidy For CCPOA

CBM attorneys **Gregg Adam**, **Jonathan Yank** and **Jennifer Stoughton** recently initiated a lawsuit on behalf of CCPOA challenging the passage of Assembly Bill 12 of the Fourth Extraordinary Session (Evans) ("AB12"), which eliminated the Rural Health Care Equity Program ("the RHCEP"). The RHCEP was a longstanding benefit afforded to qualifying BU6 employees (and the employees who supervise them) that subsidized the higher costs of health care associated with living in the rural areas of the state. Qualifying employees received a $125 subsidy in their monthly paycheck to offset their higher medical costs.

On July 24, 2009, in the dead of night, without any prior notice of the contents of the Bill, the Legislature enacted AB 12, entitled "State government," which purported to make wide ranging changes to the Budget Act of 2009 on a variety of issues, including the elimination of RHCEP. Subsequently, CBM filed a lawsuit against the State alleging that AB 12 is unconstitutional because it violates the California Constitution Article IV, Section 9's single subject and title clauses. CBM claims that the State may not combine multiple widely disparate subjects—such as horse racing, economic development, mobile home parks, victim's rights, information technology reports, the Emergency Services Act, the National Guard and state employee healthcare (see AB 12)—in a single bill. Nor may the State join unduly diverse provisions bearing no reasonable relationship under the excessively generic title "state government."

As a result of this violation of the Constitution, CBM will ask the Court to

declare AB12 unconstitutional and to reinstate the RHCEP. No hearing is currently set in this case. CBM has also been authorized to challenge the elimination of the RHCEP on behalf of BU 8 (CDF Firefighters). CBM's challenge will be under the grievance and arbitration provisions of its MOU and will be based on the fact that money already in the RHCEP was contractually obligated to be used for the RHCEP and cannot be taken for use in the General Fund.

CBM pursues state Labor Code "off the clock" claims for state correctional custody staff

CBM's San Francisco labor team of **Gregg Adam, Jonathan Yank, Natalie Leonard** and **Jennifer Stoughton**, is pursuing an action in San Francisco Superior Court on behalf of tens of thousands of correctional custody staff employed by the California Department of Corrections and Rehabilitation. The lawsuit asserts that the employer is not paying nonexempt employees for all of the time they are under their employer's control. It is a hybrid "walk time"/"donning and doffing" suit, but unlike the multiple ongoing "donning and doffing" suits presently being litigated in federal court, it is based on California's far more employee-friendly wage and hour laws. (Of course, since United States Supreme Court's 1997 decision in *Alden v. Maine*, the state is not subject to damages actions under the FLSA. Only the United States Department of Labor can bring such claims against the state.)

The basic theory of the case is that the state only compensates its custody staff for the time they are at their post, plus a brief amount of walk time. This leaves considerable time on a daily basis, where employees are subject to CDCR's control, but are not compensated.

The case is presently in at the pre-class certification discovery stage. It is anticipated that class certification will be decided in the late spring of 2010.

CB&M Continues the Fight to Prevent Imposition of the Federal Minimum Wage on State Workers During a Future Budget Impasse

By Jonathan Yank

During a budget impasse following the June 15, 2008 Constitutional budget deadline, Governor Arnold Schwarzenegger issued an Executive Order purporting to reduce the hourly wage of most State employees to the federal minimum wage (then $6.55 per hour). Subsequently, the California Department of Personnel Administration ("DPA") issued a "Pay Letter" directing State Controller John Chiang to implement the Executive Order. When the Controller refused to implement the Executive Order, the DPA and its Director, David A. Gilb, filed suit in the Sacramento Superior Court, asking the court to order the wage reduction. *David A. Gilb, et al. v. John Chiang, et al.*

CBM immediately intervened in the case on behalf of the California Correctional Peace Officers' Association and California Statewide Law Enforcement Association. Several other unions also intervened in the case. CBM then removed the case to federal court on the ground that the case raised issues under federal law, particularly the Fair Labor Standards Act ("FLSA"). This action was also taken for the practical purpose of delaying a ruling until after the passage of a State Budget. Although the case was ultimately sent back to State court, this did not occur until after a budget was passed on September 23, 2008. Thus, implementation of

the minimum wage for most State workers was averted.

Nonetheless, the DPA asked Judge Frawley of the Sacramento Superior Court to issue a decision that would require the State Controller to comply with a similar Executive Order in the event of a future budget impasse. Over opposition by the State Controller, CCPOA, CSLEA, and the other unions of State employees, Judge Frawley ruled in favor of the DPA.

CBM appealed the decision and filed an Appellants' Opening Brief on October 29, 2009, because of our clients' strong interest in preventing such crippling wage reductions during an inevitable future budget impasse. Other appellants also filed briefs, including the Controller's office and other union intervenors.

The focus of our argument on appeal is that Judge Frawley failed to recognize that simultaneous compliance with the Executive Order and the FLSA is impossible for law enforcement and fire prevention personnel who must frequently work compelled overtime. The FLSA, which overrides any conflicting state law (including an executive order), requires that an employee who works overtime must receive his or her full regular pay (not the minimum wage) plus premium overtime pay. Thus, an Executive Order compelling payment of only the minimum wage violates federal law and may not be enforced.

The State's opposition briefing will be due on December 30, 2009. No hearing is set.

Merced POA Extends Contract

The Merced POA voted to ratify an MOU to extend two years through December of 2011. Although the MOU has no pay increases, there will be an increase in health payments by the City to just below 95% of the core Health programs offered through the City's insurance. That accounts for a $60 per pay period increase at the family level in the first year, and proportional increases in the second year, based on just below 95% of the core insurances.

Other benefits included adding the possibility of two-year extensions to specialty assignments, including detectives, defensive tactics instructors, motor officers and the Crime Scene Response Team.

Of the greatest significance was an economic zipper clause that prevents the City from making any reductions in economic benefits whether covered by the contract or not, during the term of the MOU. The City is left only with the option of laying off officers. The POA reserves the right to meet and confer on mitigation of layoffs if the city proposes that. This clause is important because the City instituted a step increase freeze because it was not specifically mentioned in the contract. The City merely had to meet and confer to impasse in order to adopt it. Such a freeze would be prohibited under the new MOU language. The contract was negotiated by CBM labor partner **Gary M. Messing**, with the able assistance of the POA President, **Keith Pelowski** and his Executive Board, **Ken Coe**, **Joe Deliman**, **Donnalee Hartman** and **Leon Pintabona**.

Ninth Circuit Holds that Employee is Entitled to a Full Evidentiary Hearing Regarding the Reasons for His Layoff

By Jason Jasmine

Historically, civil service employees have not been entitled to a full evidentiary hearing

regarding the reasons for their layoff. Rather, all that is typically contested is whether the layoff provisions of any negotiated MOU or Personnel Code have been followed. A recent Ninth Circuit decision, however, seems to have expanded the rights of civil service employees impacted by layoffs. *Levine v. City of Alameda*.

Levine contended that his layoff was a pretext and he was being terminated because the City Manager did not like him. According to the Court, because Levine had a property interest in continued employment, he was entitled to have a more limited (*Skelly*, or in the federal context, *Loudermill*) hearing before his lay off to allow him to present his side of the story. Failure to provide Levine with such an opportunity was a violation of his due process rights. The Ninth Circuit found the district court's remedy for the violation – a full evidentiary hearing, with an impartial third-party – appropriate. It is not clear that the Ninth Circuit would have concluded a full evidentiary hearing with a neutral third party was necessary but for the City's failure to provide Levine with his pre-termination due process rights. However, this decision clearly holds that a civil service employee is entitled to (at the very least) a pre-termination hearing. If the employee is denied a pre-termination hearing, then an appropriate remedy is a post-termination full evidentiary hearing before a neutral third party.

CBM and the State Furloughs Fight

CBM's San Francisco team, led by partner **Gregg Adam** and associate **Jonathan Yank**, is heavily involved in the fight against state employee furloughs on behalf of CCPOA. CCPOA filed a petition for writ of mandate and complaint for injunctive relief and damages in April in the Alameda County Superior Court. The action alleges that state correctional custody staff have received no compensation for hundreds of thousands of days worked.

The employees are supposed to "self-direct" to take three furlough days per month off; however, because of the systematic overcrowding and understaffing in California's prisons, few employees have been able to actually take the days off. All employee salaries are reduced by three days' pay--notwithstanding whether or not the employee actually takes the day off. If an employee works, he or she receives only a furlough credit (for a future day off) as compensation for that day's work.

CCPOA contends that this violates numerous provisions of the Labor Code, as well as the separation of powers doctrine because under state law, only the Legislature, and not the executive branch of government, can effectuate changes to state employee salary.

CCPOA's petition for writ of mandate was argued to Judge Frank Roesch on Monday, November 16, 2009. A decision is still pending.

Court of Appeal Guts the Exclusionary Rule in Administrative Proceedings

By Jason Jasmine

A recently published 2nd District Court of Appeal decision held that the exclusionary rule does not apply in a disciplinary proceeding involving a Caltrans worker, to bar introduction of incriminating evidence seized from his car and his pockets by the California Highway Patrol. *Department of Transportation v. State Personnel Board (Kendrick).*

According to the Court, although an illegal search took place, it occurred during a criminal investigation, and was not conducted

by the agency that employs the worker being disciplined. Thus, excluding the evidence in an administrative disciplinary proceeding would have no deterrent effect on a state law enforcement officer investigating reports of a crime occurring at another state agency. Although the criminal charges against the employee had to be dismissed because the illegally obtained evidence was necessarily suppressed in the criminal proceeding, the Court permitted the employer to use that same evidence to uphold a termination.

This case distinguished and minimized the holding in *Dyson v. State Personnel Board*, which had applied the exclusionary rule to bar the use of illegally obtained evidence in a disciplinary proceeding. The Court distinguished *Dyson* on the grounds that in *Dyson*, the evidence seized was not the product of independent police work. Rather, the search was directed by the employing agency, and the evidence was seized by the employing agency. Because the illegal search was conducted by the employing agency, it could not profit from such an illegal search by using the illegally obtained evidence in a disciplinary proceeding. In *Kendrick*, however, because the illegal search was not conducted nor requested by the employing agency, there is no nexus tying the employer to the search. Even though the CHP and Caltrans are both state agencies, the Court found these entities to be wholly distinguishable and independent of each other.

A troubling decision extending POBR's one year statute of limitation

By Jennifer Stoughton

On May 2, 2006, the plaintiff was notified that he was being charged with six counts of misconduct. He was ultimately found guilty of counts 1, 2 and 4-6 and was terminated. In his lawsuit challenging his termination, the court found that the plaintiff's misconduct was reported to a supervisor on October 4, 2004, but that 576 days elapsed before he received notice of the charges (on May 4, 2006). The court also found that the one year statute of limitations was held in abeyance from May 17, 2005 through November 16, 2005 while the charges were the subject of a pending criminal investigation. The court concluded that since counts 4 and 5 (based on alleged misuse of the Department's computer systems) were discovered during a March 1, 2005 internal audit, and count 6 (alleged false statements during an internal department investigation) was discovered during the course of a November 17, 2005 interview concerning the allegations that formed the basis for count 2, they were within POBR's one-year statute of limitations. *Crawford v. City of Los Angeles* (2009) 175 Cal.App.4th 249.

In so finding, the court rejected the notion that counts 4 and 5 should not have been tolled during the pendency of the criminal investigation because they were not criminal in nature. The court held that when an investigation involves both criminal and noncriminal misconduct, POBR acts to toll ***all*** charges (including the noncriminal allegations) pending the outcome of the criminal investigation.

The court also rejected the plaintiff's contention that count 6 was barred under the rule announced in *Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46 (a case **CBM** prevailed on at the court of appeal) that "dishonesty in denying an underlying charge does not start a new limitations period for discipline under [POBRA]." *Alameida* involved a correctional officer who was accused of committing sexual offenses in September 1998 and was accused of lying about that allegation in

July 2000 after a criminal investigation was dropped due to insufficient evidence. The plaintiff was dismissed from employment within the one-year statute of limitations as to the false allegation statement but was beyond the statute of limitations as to the sexual offense allegation. The court overturned the dismissal as time barred under POBR because it found that to allow the dishonesty charge to survive when the time period for the underlying offense had passed would defeat the purpose of POBR's one year statute of limitations.

Relying on *Alameida*, the plaintiff asserted that count 6 was barred because it involved allegations that the plaintiff lied during the investigation into count 2. Because count 2 involved allegations based on misconduct that the Department knew about as of October 5, 2004, the plaintiff reasoned that the statute of limitations for count 6 should have been the same as count 2.

Although the court did not go so far as to overrule *Alameida* as urged by defendants, it did find that the facts of this case were distinguishable because, given the application of the tolling during the pendency of the criminal investigation, the statute of limitations on count 2 had not expired as of November 17, 2005 when plaintiff allegedly made the false statements. Thus, the court concluded that the rule from *Alameida* is not applicable because it only prohibited the reviving of an already expired charge.

Although the court was careful to distinguish *Alameida* and specifically declined to overrule it, this decision does represent a troubling extension of POBR's one-year statute of limitations. Essentially the court found that as long as charges of dishonesty concerning a pending investigation are made within the statute of limitations for the original investigation, the dishonesty charge has its own statute of limitations that starts to run only when the employer should have discovered the false statements. We intend to keep a close eye on similar "extensions" of POBR's statute of limitations.

POBR's one-year statute of limitations does not apply to terminated officers

By Jennifer Stoughton

In yet another case involving an interpretation of POBR's one-year statute of limitation, the Second District Court of Appeal found that the one-year statute of limitations only applies to protect public safety officers. Therefore, it was tolled during the time period that the plaintiff, who had been terminated based on other charges for one year and then reinstated, was not considered a public safety officer. It made no difference that he was later reinstated. The Court also found that prior to his reinstatement, the plaintiff refused to participate in any investigation and told the Department to consider him unavailable. This also tolled the statute of limitations period because Government Code section 3304(d)(5) provides that the one-year statute of limitations does not apply "[i]f the investigation involves an employee who is incapacitated or is otherwise unavailable." *Melkonians v. Los Angeles County Civil Service Commission* (2009) 174 Cal.App.4th 1159.

Santa Clara County Pays $500,000 to Settle Public Records Suit

By Scott M. Burns

CBM frequently uses the California Public Records Act (CPRA) to obtain information from government agencies that is relevant to bargaining and negotiations, to litigation matters, to defending employment actions, and to a wide variety of other purposes. When the law was passed, the California legislature prefaced it by saying, "...access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." To help ensure that the public's right to information is not thwarted, the Legislature provided a very important enforcement mechanism -- the right to recover costs and attorneys fees if one has to go to court to compel an agency to release public records.

Underscoring the significance of this right, the County of Santa Clara recently agreed to a $500,000 settlement in what is believed to be the largest fee/cost payment ever obtained in an action brought to enforce the CPRA. The settlement was the culmination of a three year legal battle by the California First Amendment Coalition to obtain electronic copies of the county's GIS (Geographic Information System) mapping records without restrictions on use and for a fee that does not exceed what the CPRA allows. (Generally, an agency may recover only the direct cost of duplicating a record.)

In the early 1990s the County of Santa Clara converted its existing real estate parcel maps to digital form. The maps include aerial photographs, assessor parcel information, streets and other infrastructure. The information is primarily used by other government agencies, although utility and real estate companies also have an interest in the data. The County expected to recoup development costs and ongoing maintenance by selling the data, at costs as much as $158,000, to real estate industry, public safety organizations, and other private and public agencies.

In 2005, the California Attorney General issued an opinion that such GIS data was subject to the CPRA and should be provided by counties at the nominal cost provided by the CPRA. While most California counties did so, several, including Santa Clara, continued to offer their data for sale at much higher costs. In June 2006 the California First Amendment Coalition, a non-profit public interest organization, asked for the county's GIS "basemap" and sued the county when it refused to provide the information. Santa Clara argued that the digital maps constituted copyrighted proprietary software (which is specifically exempted by the Public Records Act) and that the loss of licensing fees would undermine support for the County's mapping activities. It also later raised homeland security concerns about alerting potential terrorists to the location of pipelines and other critical infrastructure.

In May 2007, the Santa Clara County Superior Court rejected the County's arguments and ruled that it had to provide public access to the data at reasonable cost. The County appealed. In February, 2009, the Sixth District California Court of Appeal affirmed the trial court's decision, granting CFAC's demand for the data at no more than the cost of duplication, and without any restrictions on use.

The Court of Appeal's decision was issued in February, and after the period for potential further appeal expired in April, the case was sent back to the trial court for a determination of the costs that the county would be permitted to charge for the data CFAC

requested. Under the CPRA, a fee award is mandatory to a prevailing plaintiff. After four months of negotiation, the County provided the data in the format requested and agreed to a half-million dollar settlement for the costs and fees. Santa Clara County had been selling its geographic data for up to $158,000; the cost CFAC finally paid was $3.10 each for four diskettes.

Although a case involving GIS mapping data might seem of little use to CBM clients, the court's decision recognized some very important broader principles**.** The Court was also clear that California government entities do not have the right to use copyright law alone to restrict disclosure or to impose any limitations on the use of their data once it is provided. The implications of this decision could also apply to virtually any other government-created databases. California's State Personnel Board, for example, has claimed copyright protection in the past for some of its salary and occupational surveys. Other agencies have tried to use copyright law or end-user agreements to prevent union activists from posting government data on blogs and websites.

This settlement follows another major award last year by the Sixth District Court of Appeal when it affirmed an award of $244,287.50 against Monterey County in an unpublished case involving documents related to a pending subdivision proposal.

New Law Prevents Public Entities from Using the Risk of Potential Fee Awards to Stifle Criticism.

By Scott M. Burns

Newly enacted legislation will limit the ability of public entities to censor, intimidate, or punish citizens who sue to enforce their rights under the California Public Records Act, Bagley-Keene Open Meetings Act, or the Ralph M. Brown Act. Senate Bill 786 is intended to prevent public entities from using what are known as "anti-SLAPP" motions to stifle criticism or opposition.

SB 786 addresses the problem of a good idea with unintended consequences. Prior to 1992, some large corporations and developers would try to silence their critics by filing false defamation or business interference actions against them. Winning such a lawsuit wasn't the objective. The objective was to intimidate or punish their critics by subjecting them to the threat of extremely costly litigation. Such lawsuits came to be identified as SLAPP suits (Strategic Lawsuits Against Public Participation.)

In 1992, the California Legislature enacted an anti-SLAPP law that allows defendants to file a special motion at the outset of a lawsuit to terminate a SLAPP suit arising out of their exercise of free speech or petition rights in connection with a public issue. The statute applies to any writing or speech made in connection with an issue being considered in a legislative, executive, or judicial proceeding or to speeches made in a public forum. Defendants prevailing on an anti-SLAPP motion are entitled to a mandatory award of reasonable attorney's fees. More than 200 published court opinions have interpreted and applied California's anti-SLAPP law.

Unfortunately, anti-SLAPP motions can be abused in much the same way as SLAPP motions. A public entity that has been sued for failing to comply with public record or open meeting laws can use the tactic of filing an anti-SLAPP motion to silence its critics. The filing of an anti-SLAPP motion stays all discovery.

Therefore, defeating the motion can be extremely difficult for the plaintiff because he or she must effectively prove they have a viable case without the benefit of the evidence that would ordinarily have been obtained during discovery. Winning the anti-SLAPP motion might not even necessary for the public entity if the plaintiff succumbs to the intimidation of mounting legal costs.

As one example, in 2007, the non-profit public interest organization CalAware filed an action against a school district, alleging violations of the Brown Act, the CPRA and the First Amendment. It challenged the board's censure of one of its members for his criticism of board action and the superintendent's deleting the board member's remarks from the video recording distributed for cable TV replay. The trial court dismissed CalAware's action after the school district filed an anti-SLAPP motion. As a result, the nonprofit organization was ordered to pay nearly $80,000 in costs and fees. This case lead to widespread concern that the anti-SLAPP law could be used to subvert the very speech and petition rights the law is intended to protect, thereby chilling the willingness of citizens to pursue their legal rights.

SB 786 addresses this problem by providing that fee and cost awards will not be made for anti-SLAPP motions granted in lawsuits filed to enforce the public's right of access to meetings under the Brown and Bagley-Keene Acts or to government information under the Public Records Act. The bill affects only the ability of a government entity to collect attorney's and costs if it prevails on its anti-SLAPP motion. Both the Brown Act and CPRA still permit an agency to receive an award of costs if it wins the underlying lawsuit and the court finds the underlying action to have been "clearly frivolous" or lacking in merit. Similarly, the new law would not prevent government entities or bodies from using the anti-SLAPP law to challenge a case it thought was improper. But it would protect citizens who go to court in good faith, even if they ultimately lose the underlying suit.

Since CBM must occasionally use the courts to enforce its and its clients, rights of access to government records, it very much welcomes the new law.

The Courts Have Exclusive Jurisdiction to Determine Matters Related to Interest Arbitration for Firefighters

By Natalie Leonard

In *City of San Jose v. International Assn. of Firefighters, Local 230*, the Court of Appeals analyzed this pending case under a recent amendment to the Meyers-Milias-Brown Act (MMBA), reversing the trial court dismissal. The Court held that after the passage of the amendment, the court, not the Public Employee Relations Board (PERB), had exclusive jurisdiction to determine matters related to interest arbitration for firefighters pursuant to the new amendment.

This case involves the City of San Jose and its Firefighters Union. In San Jose, disputed issues of contract formation between the city and the union that reach impasse settle through binding arbitration. In contrast, issues of contract interpretation are resolved through grievances that will ultimately be resolved by PERB pursuant to the MMBA if they are not resolved sooner. When PERB has original jurisdiction, the parties may only turn to superior court to appeal an issue first decided by PERB.

During negotiations, the union offered 36 bargaining proposals, including two related to retirement benefits.

The City filed a complaint in superior court seeking an order that the union's two retirement bargaining proposals were outside the scope of representation and therefore were not subject to interest arbitration. The union, in contrast, moved to compel arbitration. PERB intervened and moved to dismiss the entire action, alleging that PERB had exclusive jurisdiction. The trial court agreed with PERB and dismissed, but the appeals court reversed.

The Court interpreted an amendment to the MMBA which had passed since the trial court case had been decided. First, the court examined whether the amendment could apply to pending cases, determining that it would because the amendment was procedural and it stripped PERB of certain cases over which it previously had jurisdiction. Therefore, the court could revisit the dismissal ordered prior to the amendment of MMBA 3509(a).

The new portion of the MMBA reads: "superior courts shall have exclusive jurisdiction over actions involving interest arbitration . . . when the action involves an employee organization that represents firefighters, as defined in Section 3251." (§ 3509, subd. (e).)

Simple statutory interpretation established that the court, and not PERB, had exclusive jurisdiction to address the disputed issues in this case as they related to interest arbitration. Therefore, the Court reversed the trial court's dismissal and remanded for further proceedings in superior court, rather than PERB.

City Not Vicarously Liable for Sexual Assault

By Lina Balciunas Cockrell

The Third District Court of Appeal took a significant step in limiting vicarious liability for sexual assaults committed by firefighter employees on duty in the case of *M.P. v. City of Sacramento*, 177 Cal.App.4th 121 (2009), departing from precedent set by the California Supreme Court. In *Mary M. v. City of Los Angeles*, 54 Cal.3d 202 (1991), the Supreme Court had held that a public entity that employs a police officer can be vicariously liable for a rape committed by the officer against a woman he detained while on duty. The Supreme Court had reasoned that the police officer's act "was not so divorced from his work that, as a matter of law, it was outside the scope of employment" because "[t]he danger that an officer will commit a sexual assault while on duty arises from the considerable authority and control inherent in the responsibilities of an officer in enforcing the law."

In *M.P.*, plaintiff, a 24-year old woman, was working as a photographer at the Porn Star Costume Ball. A crew of firefighters had driven their trucks to the event, including a captain who allegedly watched the firefighters drink and flirt with women. One of the firefighters invited plaintiff to take photographs of him and another firefighter on the fire truck. Once on the fire truck, the two firefighters allegedly committed sex acts with plaintiff against her will. One of the firefighters was off-duty and one was on duty at the time.

Plaintiff sued, among others, the city, alleging that the city and its fire department "had policies permitting firefighters 'to take fire trucks and engine trucks to bars and parties, and with captains present, pick up on women and

take women on their fire trucks.' The employees 'took advantage of their status as firefighters and the post 9/11 public sentiment perception that firefighters are 'heroes'' and 'abused their authority by picking up women and drinking on the job.'"

The city moved for summary adjudication, claiming that as a matter of law, a sexual assault committed by a firefighter, even on duty, at a social event at a hotel was outside the scope of employment and not conduct for which an employer could be vicariously liable. The trial court granted the city's motion. The Court of Appeal affirmed, finding that the holding extending vicarious liability in the *Mary M.* case was limited to police officers who commit sexual assaults against women whom they detained while on duty. The Court noted that the firefighters, in contrast, had "no coercive authority over the victim. Nor did they purport to detain her for any firefighting investigation or even purport to be engaged in any duty of a firefighter; they simply invited her to take photographs of them in the fire truck."

The Court concluded that the sexual assault really had nothing to do with the firefighters' work as firefights and thus, fell outside the scope of their employment and the city could not be vicariously liable.

Two Strikes but Sacramento County Wants to Take One Final Swing at Retiree Health Benefits

For almost two years, we have been reporting on the status of multiple cases at the Public Employment Relations Board ("PERB"), involving Sacramento County's repeated efforts to unilaterally reduce or eliminate future retiree health benefits for current employees. In spite of two final decisions from PERB in favor of the Sacramento County Attorneys and Accountants ("SCAA" and "SCPAA"), the County is still stubbornly refusing to admit that it violated black letter labor law regarding unilateral changes to retirement benefits for current employees. Most recently, it has filed a Petition for Writ of Mandate to the Third District Court of Appeal. As PERB has ordered the County to pay interest on the retiree health benefits it has already improperly withheld, the longer the County delays in complying with the law, the greater the cost to the cash-strapped County. CB&M Labor attorneys **Gary Messing** and **Jason Jasmine** will continue to fight the County on behalf of SCAA and SCPAA, and are in the process of preparing an Opposition to the County's Petition. As we have said all along, had the County taken the simple step of meeting and conferring, this fight (now stretching well over three years) would not have been necessary.

We will continue to keep you updated on this situation.

Public Employers Are Exempt From California Statutes Requiring Payment of Premium Overtime Wages, Provision of Meal Breaks, and Timely Payment of Wages Upon Resignation or Termination

By Jonathan Yank

An employee of a public water storage district filed a class action complaint against the district, asserting that he and a putative class of current and former employees were denied overtime wages and meal breaks in violation of California Labor Code sections 510 and 512, as well as the Industrial Welfare Commission ("IWC") wage orders implementing them. The employee also asserted that the district violated

Labor Code sections 201, 202, and 203 by failing to pay such wrongfully-withheld wages upon an employee's resignation or termination.

The water storage district demurred to complaint on ground that, as a public entity, it was exempt from those wage and hour statutes and regulations. The Superior Court sustained the demurrer, and the plaintiff appealed.

The Court of Appeal in *Johnson v. Arvin-Edison Water Storage Dist.*, affirmed the decision of the Superior Court. It held that, as a public agency, the water storage district was exempt from Labor Code sections 510 and 512 (and the IWC wage orders implementing them). The court referenced prior decisions holding that public entities are not subject to statutes of general application unless such entities are expressly included. The Court then noted that, while companion statutes expressly covered public entities, neither section 510 nor 512 did so, thus indicating an implied legislative intent that those provisions would not apply to governmental entities.

Separately addressing the appellant's argument that the rule excluding public entities from the ambit of general statutes should not apply because Labor Code sections 510 and 512 would not infringe on the water district's "sovereign powers," the Court simply disagreed. The Court noted that provisions of the California Water Code expressly grant the district the power to set employee compensation and held that application of sections 510 and 512 would infringe upon that power.

Finally, addressing appellant's claims under Labor Code sections 201, 202, and 203, the Court noted that Labor Code section 220 expressly provides that these statutes "do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other *municipal corporation*." Referencing existing case law, the court stated, "it has long been established that irrigation districts and water districts are municipal corporations." Thus, the Court affirmed the ruling of the lower court, holding that "the trial court correctly concluded that the District is exempt from the requirements of sections 201, 202 and 203."

It should be noted that this case does not address the application of many other "wage and hour" protections in the Labor Code to public employers and employees. However, by implication and pursuant to longstanding principles of statutory interpretation, many provisions not excluded by section 220 should be held to apply, e.g., Labor Code section 212 (requiring payment in cash or cash equivalent) and Labor Code section 222 (requiring payment at rates agreed-to in collective bargaining agreement) . Other provisions made expressly applicable to public entities will also apply, as will others that do not infringe on an entity's "sovereign powers, e.g., Labor Code section 928 (limiting deductions from wages for late arrival at work).

Post-Termination Effort to Put a Fired Employee on Disability Retirement Will Not Prevent the Former Employee from Challenging the Termination

By Jonathan Yank

The Plaintiff in *Riverside Sheriffs' Association v. County of Riverside* (2009) 173 Cal.App.4th 1410, was a peace officer employed by the County of Riverside as senior deputy attorney investigator. The Plaintiff had a good performance record and, just over two months prior to the events precipitating this lawsuit, she received a promotion.

In June 2006, the Plaintiff was removed from her job after she hand-delivered a rambling 16-page letter from her husband to her supervisor, in which her husband complained that the Plaintiff was being sexually harassed at work. A clinical psychologist who was asked to review the letter expressed the opinion that the Plaintiff's husband was paranoid and delusional, and that he represented a threat to the District Attorney's office staff. The psychologist also concluded that the Plaintiff posed threat because, by delivering her husband's letter, she appeared to support his pathological behavior.

The Plaintiff was placed on paid administrative leave pending the outcome of a fitness-for-duty exam to be conducted by the same psychologist. Following the examination in July of 2006, the psychologist concluded that the Plaintiff was not fit for duty and should not be allowed to carry a gun. The Plaintiff was put on unpaid leave status in October of 2006.

The Plaintiff filed a grievance in December 2006, requesting reinstatement and challenging her removal from paid administrative leave. However, in March of 2007, the County sent the Plaintiff a letter informing her that her employment was terminated because she no longer met the requirements of her job (i.e., she was no longer qualified to carry a gun).

In late March of 2007, the Plaintiff filed an appeal under the procedures established by the MOU between her Union and the County, but the County rejected the appeal and refused to hold a hearing. The County asserted that the termination was non-disciplinary and that, consequently, the MOU appeal process did not apply.

Several months later, in November 2007, the County applied for involuntary disability retirement on behalf of the Plaintiff. The County took the position that she suffered from a mental disability and was, therefore, incapacitated within the meaning of the laws governing the California Public Employees' Retirement System ("PERS").

Plaintiff filed a petition for writ of mandate seeking to compel the County to hold her appeal hearing (pursuant to the MOU) and to force compliance with the requirement of POBR that the County provide an administrative appeal following a "punitive" action. After a hearing, the trial court concluded that the Plaintiff was entitled to an appeal hearing under the MOU, but was not entitled to relief under POBR because, according to the trial judge, the County's action was not punitive. Both parties appealed.

The Court of Appeal sustained the trial court's issuance of the writ on the MOU grievance procedure, but it reversed the lower court's dismissal of the POBR claim, holding:

1) The trial court properly ruled that the Plaintiff was entitled to an MOU appeal hearing because: (a) she was terminated for cause, (b) the County's application for involuntary disability retirement under PERS constituted a separate and distinct employment action, and (c) consequently, the Plaintiff was not limited to challenging her separation solely through the PERS administrative process; and

2) The trial court erred in denying the Plaintiff's petition for relief under POBRA because, under *White v. County of Sacramento* (1982) 31 Cal.3d 676, a termination of employment is "per se" punitive and, consequently, POBRA applied as a matter of law.

Supreme Court Holds No Mixed Motives in Age Discrimination Cases

By Lina Balciunas Cockrell

The United States Supreme Court recently refused to shift the burden of persuasion from a plaintiff seeking to establish age discrimination in employment in the case of *Gross v. FBL Financial Services, Inc*. The issue before the Supreme Court was whether a plaintiff must present direct evidence of age discrimination in order to obtain a jury instruction on "mixed motives" in a suit brought under the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) ("ADEA"). The principle of "mixed motives" derives from the case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where, with respect to claims under Title VII of the Civil Rights Act of 1964, the challenged employment decision may have been the result of "a mixture of legitimate and illegitimate motives." The Supreme Court held that once a plaintiff demonstrates that an improper motive was a factor in the employment decision, the employer defendant has to prove that it would have made the same decision even without the improper motive in order to avoid liability.

In *Gross*, however, the Court declined to apply the *Price Waterhouse* holding to ADEA claims. Writing for the 5-4 majority, Justice Clarence Thomas noted that unlike Title VII, the language of the ADEA does not allow a plaintiff to establish discrimination by showing that age was simply a motivating factor. Congress had the opportunity to add such language when it amended Title VII to expressly authorize discrimination claims where an improper motive was a "motivating factor" for the adverse action in 1991. Congress also amended the ADEA at that time and its failure to include the same or similar language as Title VII must be construed as intentional. Accordingly, the text of the ADEA as written does not authorize a "mixed motives" age discrimination claim.

"The ADEA provides, in relevant part, that '[i]t shall be unlawful for an employer . . .to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age.' 29 U. S. C. §623(a)(1) (emphasis added)." The term "because of" is generally defined as "by reason of" or "on account of." The majority concluded that "the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act." Thus, to establish discrimination under the ADEA, a plaintiff must prove that age was the "but for" cause of the employer's adverse action. In other words, "but for" the plaintiff's age, he never would have been demoted, laid off, reassigned, etc.

Justice John Paul Stevens wrote a scathing dissent for the four minority justices, in which he criticized the majority's interpretation of the ADEA and accused the Supreme Court of engaging in unnecessary judicial activism. Justice Stevens noted that the Supreme Court had previously construed the same "because of" language in Title VII in the *Price Waterhouse* case and still established the "mixed motives" framework. Justice Stevens characterized the majority's decision as "an utter disregard of our precedent and Congress's intent."

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