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DISCRIMINATION/HARASSMENT

EMPLOYER'S ON-DUTY RESPONSE TO OFF-DUTY MISCONDUCT CAN ITSELF CREATE HOSTILE WORK ENVIRONMENT

Fuller v. Idaho Dep't of Corrections, 865 F.3d 1154 (9th Cir. 2017)

Plaintiff Cynthia Fuller was a probation and parole officer who began an intimate relationship with co-worker Herbt Cruz, a senior probation officer. (Both kept the relationship secret despite an agency policy requiring disclosure of such relationships.) Six months later, Cruz was placed on administrative leave due to a confidential investigation into a rape allegation against him by a civilian. District Manager Harvey called a staff meeting, advising the employees that Cruz was on administrative leave because of a confidential, ongoing investigation and "was not authorized to be on the premises," but that the IDOC looked forward to Cruz' prompt return to work. The next day, Fuller disclosed her relationship with Cruz to her supervisors. Over the next two weeks, according to Fuller, Cruz raped her three times, all outside the workplace. Fuller reported the rapes to the authorities and to IDOC, which received photographic evidence of her injuries, which were serious. Harvey told Fuller that Cruz "had a history of that kind of behavior." Fuller got a protective order against Cruz prohibiting him from coming within 1000 feet of her.

Henry Atencio, Deputy Chief of their division, directed Harvey to maintain contact with Cruz while he was on leave, to keep him informed of the investigation's status and "make sure he's doing okay in terms of still being our employee." Fuller knew about Cruz' continued contacts with supervisors while on leave. On the day Fuller obtained the civil protection order, Harvey sent an e-mail to all staff, including Fuller, saying he had talked to Cruz, that Cruz was understandably down, and that if they "wanted to talk to him, give him some encouragement," they should "feel free." Following an internal affairs investigation, the agency concluded it would terminate Cruz' employment, but it waited 2 months (as the criminal matter was proceeding) to notify Cruz and did not tell Fuller that Cruz would not be returning to the work place.

Fuller had gone on leave after reporting the rapes to management. Harvey told Atencio and Fuller's direct supervisors about her allegations, that she was on leave, and that if others inquired about the leave they should attribute it to a previously disclosed illness. Fuller was denied her requested paid administrative leave, and during the FMLA leave she was required to use vacation and other accrued leaves. Although she was diagnosed with extreme anxiety, she returned to work in a light duty capacity, taking only intermittent FMLA leave. Fuller later requested paid leave again, noting that (1) Cruz was being paid during his administrative leave; (2) she had "received no guidance from the IDOC regarding any assistance . . . as a victim, including" filing a sexual harassment claim; and (3) the IDOC had put other "potential victim[s]"

at risk by failing to disclose to staff why Cruz was on leave and by stating that it "hopes he returns soon." The IDOC did not respond to her letter. Her request was denied, according to the supervisors, because her situation was not deemed "unusual."

Fuller also told her supervisors she was in an "uncomfortable work environment". Staff, unaware of why she had been absent from work, suspected that she was "faking being sick" and ostracized her because they had been misled about Cruz' situation. Harvey explained that he was "not at liberty to say why [Cruz is on leave] because . . . that wouldn't be fair. . . if the allegations were proven untrue," and Cruz would have a "stigma hanging over [him]." Fuller said Harvey's later encouragement of staff to give Cruz "moral support," despite knowing that she had accused him of rape, was "completely insulting." Harvey replied that he was "trying to keep [her] out of it." Fuller asked that the IDOC inform District 3 employees of the civil protection order, explaining that she did not "feel safe" because Cruz could walk in to the building and no one would call the police. Atencio responded that, "as much as you find this distasteful, Cruz is still our employee. And we have to be conscious of his rights."

Fuller resigned and sued, *inter alia*, for hostile work environment and gender discrimination claim under Title VII. The district court granted the defendants' motion for summary judgment, rejecting Fuller's hostile work environment claim on the grounds that the rapes occurred outside the workplace and that the IDOC had taken remedial action. Fuller timely appealed and argued that the IDOC's reactions to the rapes — effectively punishing her for taking time off, while both vocally and financially supporting her rapist — created a hostile work environment. The issue on appeal was whether an objective, reasonable woman would find "her work environment had been altered" because the employer "condoned" the rape "and its effects."

Viewing the facts in the light most favorable to Fuller, the court held that Fuller had raised triable issues of fact as to the existence of a hostile work environment. In light of the severity of the sexual assaults on Fuller, documented by the photographs seen by the IDOC supervisors, a reasonable juror could find that the agency's public and internal endorsements of Cruz "ma[de] it more difficult for [Fuller] to do her job, to take pride in her work, and to desire to stay in her position." A reasonable woman in Fuller's circumstances could perceive the repeated statements of concern for Cruz' well-being by supervisors as evincing their belief that Fuller was lying or, perhaps worse, as valuing Cruz' reputation and job over her safety. This conclusion is reinforced by the fact that Harvey and Atencio held important supervisory positions. The court stated that Fuller "was victimized by three violent rapes," and a reasonable juror could find that her employer thereafter reacted in ways that "allowed the effects of the rape[s] to permeate [her] work environment and alter it irrevocably.

THOROUGH ANALYSIS AND PRESENTATION OF LEGITIMATE BUSINESS REASONS FOR A REDUCTION IN FORCE ARE CRITICAL TO DEFENSE OF AGE DISCRIMINATION CLAIM FOLLOWING LAYOFF

Merrick v. Hilton Worldwide, Inc., __ F.3d __, No. 14-56853, 2017 WL 3496030 (9th Cir. August 16, 2017)

Plaintiff Charles Merrick was 60 years old in July 2012, when he was terminated from his position as Director of Property Operations at a Hilton hotel as part of a reduction-in-workforce ("RIF"). Due to declining revenues, the Hotel underwent a series of RIFs beginning in 2008. It

laid off eight employees in 2008, three employees (the entire pastry department) in 2009, and six employees in 2011. The hotel also left a number of vacant positions unfilled during that time period. In May 2012, Hilton Worldwide ordered a number of properties, including the Hotel, to reduce payroll expenses by seven to ten percent by August 2012.

The mandate was outlined in a document titled "Management Reduction in Workforce (RIF) Timeline – May 2012" and provided that "[r]eduction decisions should be heavily weighted at the senior level." Hilton Worldwide issued revised guidelines for implementing the RIF. These guidelines clarified the termination criteria, providing that in "identifying the individual team members to be laid off . . . [t]he primary consideration should be a team member's overall performance," followed by "any disciplinary action a team member has received." If a decision could not be made based on those factors, the guidelines instructed decisionmakers to consider employees' length of service with the company.

Merrick directly supervised seven to twelve people in his department, including Assistant Director of Property Operations Michael Kohl. Merrick's performance evaluations were consistently positive. At the time of his termination, Merrick earned a salary of $110,325 per year, plus an annual bonus of $20,000, making him the highest paid Hotel employee after General Manager Patrick Duffy. At sixty, Merrick was also the oldest management-level employee after Duffy, who was sixty-one at the time of the RIF.

Consistent with the RIF guidelines, the involved decisionmakers determined that all twenty-nine managers met performance standards, and none had been subject to disciplinary action. The spreadsheet they reviewed included the years of service for each employee. Without an obvious candidate for termination based on performance and disciplinary action, the decisionmakers considered the business case for retaining or eliminating each management-level position, and ultimately they recommended elimination of Merrick's position.

They identified several reasons for their decision. First, unlike the food and beverage or sales departments, Merrick's face-to-face interaction with guests was limited, so they perceived him as having relatively little "guest impact," and his work did not directly generate additional revenue for the Hotel. Second, the managers believed Merrick had become less "hands on" in recent years, and few employees directly reported to him. They also believed much of Merrick's responsibility for capital projects had already been outsourced. Finally, Merrick's projected salary and bonus of $132,049 satisfied the target payroll reduction of $131,614, or seven percent of the Hotel's management payroll. Thus, the managers believed eliminating Merrick's position would allow them to comply with the RIF by terminating a single employee. The decisionmakers also concluded that the Hotel could not operate without a General Manager, the only employee besides Merrick whose single salary ($192,102) would satisfy the payroll reduction target. Selecting any other position would require more than one layoff to achieve the seven percent target. They recommended Merrick for the RIF.

Merrick's termination letter advised him that he was eligible to pursue internal job opportunities, and the Human Resources Department provided him a list of open positions within the company. Merrick asked to stay on at the Hotel as Assistant Director of Property Operations (the position occupied by Kohl), but the Hotel refused. Following the RIF, Kohl assumed most — if not all — of Merrick's duties. To compensate Kohl for his increased responsibilities, the Hotel

managers recommended that Kohl receive a raise. The Hotel also hired an hourly mechanic, at $15 to $16 per hour, to cover some of Kohl's former duties.

Merrick originally raised six claims against Hilton: wrongful termination based on age, in violation of the California Fair Employment and Housing Act ("FEHA"); age discrimination in violation of public policy; failure to prevent age discrimination; wrongful termination due to physical disability; and two counts of failure to prevent disability discrimination. The district court granted summary judgment on all claims, and Merrick appealed the age discrimination claims.

The appellate panel affirmed, applying the three-part *McDonnell Douglass* burden-shifting test to analyze Merrick's age discrimination disparate treatment claims under FEHA. First, the panel held that Merrick satisfied the elements for establishing a prima facie case of discrimination, concluding that Hilton acknowledged Merrick's duties were outsourced or assumed by other employees. Accordingly, Merrick satisfied the elements for establishing a prima facie case of discrimination. Second, the panel held that the burden shifted to Hilton, which produced evidence showing that it terminated Merrick for a legitimate, nondiscriminatory reason – namely, the economic challenges facing the business, and the analysis leading to selection of his position.

The burden then shifted back to Merrick to produce sufficient evidence to allow a jury to conclude that Hilton's proffered reasons were pretexts, and that age was a substantial motivating factor in his termination. The panel held that considering the context of the case – the lost profits during the economic downturn, a series of layoffs, the overall age of the workforce, the fact that Merrick survived previous RIFS, and the business reasons for selecting his position for elimination – Merrick did not present sufficient evidence to infer that Hilton's actual motive was discriminatory.

TO SURVIVE SUMMARY JUDGMENT, FEHA PLAINTIFF MUST DEMONSTRATE THAT EMPLOYER'S REASON FOR DISCIPLINE -- BASED ON CONDUCT OCCURRING PRIOR TO DISCLOSURE OF DISABILITY -- IS PRETEXTUAL

Alamillo v. BNSF Railway Co,. __ F.3d. __, No. 15-56091, 2017 WL 3648514 (9th Cir. August 25, 2017)

In 2012, Plaintiff Alamillo worked as a locomotive engineer for BNSF. Due to his seniority, he had the choice to work either (1) a five-day-per-week schedule with regular hours or (2) on the "extra board," which requires employees to come to work only when called. Alamillo chose to work on the extra board from January 2012 through June 2012. If an extra board employee failed to answer or respond to three phone calls from BNSF within a single 15-minute period, the employee would be deemed to have "missed a call" and marked as absent for the day. BNSF's attendance policy provided that a fifth missed call during any twelve-month period "may result in dismissal."

Alamillo missed a call on ten dates in 2012. He chose to receive "Alternative Handling" for the three January missed calls, which meant that he received additional training instead of discipline. After his next four missed calls, Alamillo received a 10-day suspension and a 20-day suspension. At that point, Richard Dennison, the superintendent of the terminal where Alamillo worked, advised him to get a landline or a pager (he had given BNSF only a cell phone number) to ensure that he would not miss another call. Alamillo did not give BNSF a pager or landline phone

number; he was having an affair at the time, and he did not want BNSF to call a landline number because there were occasions when he left the house to see his girlfriend when his wife thought he was at work. Nor did Alamillo (1) seek transfer to a five-day-per-week job; (2) set his alarm for 5:00 a.m., the most common time for BNSF to call, like he had done when he previously worked on the extra board; (3) ask his wife to wake him up if his mobile phone rang while he was sleeping; or (4) check the electronic job board to see the jobs for which he could be called the next day. He subsequently missed three more calls.

After his final missed call, Alamillo informed BNSF California Division General Manager Mark Kirschinger that he intended to undergo testing for a possible sleep disorder. Alamillo asked Kirschinger if he could switch to a job with set hours; Kirschinger told him to follow the usual procedures to bid on a regular five-day-per- week work schedule, but added that the disciplinary process for his previous missed calls would proceed. Alamillo then switched to a regular schedule and was able to wake up to his alarm clock and arrive at work on time every day. Alamillo completed a sleep study in late July and was diagnosed with obstructive sleep apnea (OSA) on August 16. He was prescribed a Continuous Positive Airway Pressure (CPAP) machine, and his symptoms immediately improved. On or about August 18, Alamillo provided Dennison with a report containing his diagnosis.

Alamillo's hearings for the May 13, May 21, and June 16 missed calls occurred on August 22. Alamillo discussed his OSA diagnosis at the hearings and submitted his provider's medical opinion that not being awakened by a ringing phone is "well within the array of symptoms" of OSA. However, no medical professional opined that the May 21 and June 16 missed calls actually were caused by his OSA. BNSF Director of Labor Relations Andrea Smith reviewed Alamillo's employee transcript, the hearing transcripts, and the hearing exhibits before rendering her opinion that Alamillo should be given a 30-day suspension for the May 13 missed call and be dismissed for the May 21 and June 16 missed calls. Kirschinger, the BNSF officer responsible for making the final decision, approved the dismissal. Alamillo was told on September 18 that he was being dismissed for the May 21 and June 16 missed calls. Alamillo's union appealed his dismissal and prevailed, and he was reinstated to service.

Alamillo then sued, claiming that BNSF discriminated against him on the basis of his disability, failed to accommodate his disability, and failed to engage in an interactive process with him to determine a reasonable accommodation for his disability. *See* Cal. Gov. Code §§ 12940(a), (m)(1), (n). The district court granted summary judgment to BNSF, reasoning that BNSF could not have violated the FEHA because Alamillo's attendance violations took place before he was diagnosed with a disability and before any accommodation was requested.

The court of appeal affirmed. First, it held that Alamillo failed to establish that BNSF discriminated against him based on his disability – obstructive sleep apnea (OSA) – under FEHA. The panel applied the three-step burden-shifting test in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and held that appellant's claim failed at the first step – establishing a prima facie case of discrimination – because the record contained no evidence that appellant's OSA was a substantial motivating reason for BNSF's decision to terminate him. BNSF did not know that Alamillo was disabled when the decision to initiate disciplinary proceedings was made, and Alamillo conceded that BNSF "disregarded" his disability when it decided to terminate him.

The panel also held that even if appellant had made a prima facie case of discrimination, his claim would fail at the third step because appellant had not offered evidence that BNSF's stated reason (appellant's history of attendance violations) was either false or pretextual. The Labor Relations Director (Smith) had concluded: "Mr. Alamillo entered documentation to support his argument that he has sleep apnea; this was allegedly the reason he did not hear his phone ring. While certain arbitrators could be sympathetic, he did not seek assistance until after he faced dismissal (this would be his second dismissal), which is arguably too late." In other words, Smith considered the possibility that sleep apnea may have prevented Alamillo from hearing his phone and refused to change her decision on that basis. But that is not evidence "which would permit a reasonable trier of fact to conclude the employer intentionally discriminated." *Id.* To the contrary, it reinforces the conclusion that BNSF's articulated nondiscriminatory reason for firing Alamillo — his history of attendance violations, which culminated in the May 21 and June 16 missed calls — was sincere.

Finally, the panel held that BNSF did not violate its reasonable accommodation duty under FEHA. Essentially Alamillo expected "a 'second chance' to control the disability in the future," but that is not a reasonable accommodation. Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.

FEHA'S ONE-YEAR STATUTE OF LIMITATIONS RUNS FROM DATE EMPLOYMENT TERMINATES RATHER THAN DATE OF DECISION TO TERMINATE

Aviles-Rodriguez v. Los Angeles Community College Dist., 14 Cal. App. 5th __, No. B278863 2017 WL 3712199 (August 29, 2017))

Plaintiff Guillermo Aviles-Rodriguez was employed by Los Angeles Community College District (LACCD) as a professor. On November 21, 2013, a tenure review committee voted to deny him tenure, and he received written notice on March 5, 2014. Before receiving notice of the final decision, plaintiff initiated a grievance procedure, the third and final step of which was denied by a grievance review committee on May 21, 2014. That same month, plaintiff allegedly contacted the Department of Fair Employment and Housing (DFEH) to discuss the filing of a claim alleging racial discrimination including, but not limited to, the denial of tenure, and was advised that he had until one year from the last day of his employment to file a complaint with the DFEH. Plaintiff's employment terminated June 30, 2014, the last day of the academic year, and on June 29, 2015, he filed his complaint with DFEH. After being issued a right-to-sue letter, he filed an action against LACCD. Following several demurrers, plaintiff filed his third amended complaint (TAC) alleging a single cause of action under FEHA for racial discrimination. LACCD demurred to the TAC, arguing that plaintiff's claim was barred because he failed to file his DFEH complaint within one year "from the date upon which the alleged unlawful practice . . . occurred." (Gov't Code § 12960(d).) The trial court sustained the demurrer without leave to amend.

The appellate court reversed, concluding that the one-year limitations period for plaintiff to file a timely DFEH complaint began to run from the last day of his employment rather than from the decision to deny tenure. The court cited *Romano v. Rockwell Internat'l, Inc*. (1996) 14 Cal.4th 479, where the California Supreme Court concluded that the purpose of the FEHA is better served by interpreting the statute of limitations on a wrongful termination claim to run from "the

date of actual termination, and not from notification of termination." Here, assuming the denial of tenure was discriminatory, the harm resulting from that wrongful act was the termination of appellant's employment.

FEHA DOES NOT ENTITLE EMPLOYEE TO CHOICE OF ACCOMMODATIONS SO LONG AS ACCOMMODATION OFFERED IS REASONABLE.

Light v. California Dep't of Parks & Rec., 14 Cal. App. 5th 75 (2017)

Light worked as a seasonal Park Aide at the Department's Ocotillo Wells District in San Diego County. She was "laid off" during the summer months (July through September), which constitute the low tourist season due to the summer desert heat. In the fall, Light was rehired as a senior seasonal Park Aide. In January 2011, Light was promoted to a permanent but "intermittent" position as an Office Assistant, also at the Ocotillo Wells District. "Intermittent" meant she was not guaranteed full-time, regular hours, and that under normal circumstances, she was limited to a total of 1500 working hours per year. She was "laid off" again during the low summer months of 2011.

In the fall 2011 and spring 2012, Light worked in two different out-of-class assignments granted by her supervisor, Seals. Light was friends with a coworker, Hurley, who Seals believed was a lesbian. Seals repeatedly made comments to Light intended to make her uncomfortable about her friendship with Hurley, to enlist Light in Seals' harassment of Hurley based on her sexual orientation, and to encourage Light to cease all contact with Hurley. Hurley filed complaints against Seals and the Department for harassment and discrimination. The Department's Human Rights Office sent investigators to the Ocotillo Wells District in January 2012 to assess Hurley's allegations. Before Light met with investigators, Seals told Light she and Dolinar (Seals' supervisor and friend) expected Light and other employees to lie to the investigators. Light was expected to be on Dolinar's "team" and protect her supervisors. Seals said, "If you're not on [Dolinar's] team, your career will be over. If you don't protect [Dolinar], [and Dolinar's] staff, then your career will be over. [Dolinar] will see to it that your career will be over." (Seals went to another employee, Gravett, and told her to lie as well.) After Light met with the investigators, Seals contacted Light (and Gravett) about their interviews, wanted to know what they had said, and berated Light for not backing Seals. Seals said she should not have hired Light or given her out-of-class assignments. Light did not "fit in" and did not follow orders. Light tried to leave Seals' office, but Seals blocked her way. The next day, Seals spoke with Gravett and complained that Light had betrayed her and "knif[ed] her in the back" because she would not tell Seals what she told the investigators. Later Seals called Gravett and told her not to have any contact with Light. Dolinar was in the car with Seals during this conversation. In March 2012, Dolinar told Light she would not be receiving training previously scheduled for her. Around the same time frame, funding for Light's position was eliminated by the Department, and after she did not receive a promotion for which she applied, she was informed that no hours would be scheduled for her until funding could be restored.

Light filed a workers' compensation claim and went on medical leave for three months, after which she notified the Department that she had been diagnosed with PTSD and anxiety disorders. She requested to return to work in a higher level position (i.e., one that would otherwise require promotion) or to Ocotillo Wells only if the Department guaranteed no further hostile work environment or retaliation. The Department offered her a choice of two Office Assistant positions: one at Ocotillo Wells (where the former supervisors were gone, but where

hours were still not guaranteed), or (2) one at San Diego District (for which, if she accepted, the Department would pay her reasonable moving expenses.) She returned to work at Ocotillo Wells, but later sued the Department, Seals, and Dolinar. The trial court granted the individual defendants' motions for summary judgment as to Light's intentional infliction of emotional distress and related claims, and granted summary judgment for the Department as to claims for disability discrimination (failure to accommodate), retaliation, and failure to prevent discrimination or retaliation.

On appeal, the court concluded that the evidence viewed most favorably to Light did raise a triable issue of fact as to the alleged retaliatory "course of conduct" by Seals and Dolinar, and it reversed summary judgment against the Department on that claim accordingly. However, it affirmed as to the disability-related retaliation claim because the alleged adverse actions occurred before she disclosed a disability to the Department. It also affirmed as to the failure to accommodate and failure to prevent discrimination claims, finding that the Department reasonably accommodated Light in offering her the choice of two positions in a classification she previously held. The court explained that Light was not entitled to her choice of accommodations so long as what was offered was reasonable, and that she was not entitled to a promotion. Finally, the court as to the IIED claim against Seals that "workers' compensation exclusivity" does not bar tort claims arising out of conduct that also violates FEHA.

PUBLIC AGENCY

LAW ENFORCEMENT AGENCY MAY MAINTAIN INTERNAL *"BRADY"* LIST BUT MAY NOT DISCLOSE TO DISTRICT ATTORNEY OR OTHER THIRD PARTIES ABSENT COMPLIANCE WITH THE PITCHESS PROCESS

Association for Los Angeles Deputy Sheriffs v. Superior Court, 13 Cal. App. 5th 413 (2017)

Petitioner, the Association for Los Angeles County Deputy Sheriffs (ALADS), is the union that represents non-supervisory Los Angeles County Sheriff's deputies. The LA Sheriff's Department created a so-called "*Brady*" list of deputies whose personnel files contain sustained allegations of misconduct allegedly involving moral turpitude or other bad acts relevant to impeachment. The LASD proposed to disclose that list to the district attorney, as well as to other prosecutorial agencies that handle LASD investigations, so that prosecutors in individual cases could file *Pitchess* motions to discover the underlying misconduct or advise the defense of the disclosure so the defense could file its own *Pitchess* motion. ALADS opposed disclosure of the *Brady* list and filed this action seeking (among other things) an injunction that prohibits disclosure of the list or any individual on the list to anyone outside the LASD, including prosecutors, absent complete compliance with the *Pitchess* statutes.

In *Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*), the United States Supreme Court held that constitutional due process creates an affirmative obligation on the part of the prosecution, whether or not requested by the defense, to disclose all evidence within its possession that is exculpatory to a criminal defendant. Exculpatory evidence under *Brady* includes impeachment evidence. The prosecution's disclosure obligation under *Brady* extends not only to evidence in its immediate possession, but also to evidence in the possession of other members of the prosecution team, including law enforcement.

Eleven years after *Brady*, the California Supreme Court, in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537 (*Pitchess*), held that under certain circumstances, and upon an adequate showing, a criminal defendant may discover information from a peace officer's otherwise confidential personnel file that is relevant to his or her defense. The California Legislature eventually codified what became known as *Pitchess* motions in Penal Code sections 832.7 and 832.8, as well as Evidence Code sections 1043 through 1045.

After full briefing, the trial court issued a preliminary injunction prohibiting general disclosure of the *Brady* list to the district attorney or other relevant prosecutors. The trial court determined that such a disclosure, because it identifies administratively disciplined deputies by name in the absence of a properly filed, heard, and granted *Pitchess* motion, violates the *Pitchess* statutes. The injunction, however, expressly allowed disclosure of individual deputies from the list to prosecutors, in the absence of compliance with *Pitchess* statutes, so long as any disclosed deputy was also a potential witness in a pending criminal prosecution. The trial court acknowledged that such a disclosure also violates the *Pitchess* statutes, but held that a filed criminal case triggers *Brady* and that the LASD, as part of the prosecution team, then has a "*Brady* obligation" to disclose exculpatory evidence in its possession. Because of this obligation, the LASD, "may" notify the prosecutor that the identified deputy has a founded administrative allegation of misconduct relevant to his or her credibility. ALADS sought mandamus relief at the court of appeal.

The appellate court ruled that LASD was not precluded from maintaining an internal "*Brady* list" so long as it was not disclosed. However, it concluded that LASD may not disclose the identity of any individual deputy on the *Brady* list to any agency or individual outside the LASD, absent a properly filed and granted *Pitchess* motion and corresponding court order, even if the affected deputy is a potential witness in a filed criminal prosecution. The court of appeal ordered the injunction language modified accordingly.

POBRA REQUIRES DISCLOSURE OF INITIAL INTERROGATION RECORDING OR TRANSCRIPT EVEN WHERE SUBSEQUENT INTERROGATION IS BASED ON LATER-ACQUIRED NEW EVIDENCE

Santa Ana Police Officers' Ass'n v. City of Santa Ana, 13 Cal. App. 5th 317 (2017)

Two City of Santa Ana Police officers were the subjects of an internal affairs investigation based on their conduct during the execution of a search warrant at a marijuana dispensary commonly referred to as the "Sky High Medical Dispensary" (the Dispensary). A number of undercover officers, wearing masks to hide their identities, participated in the search. After all civilians were escorted/detained outside, Doe Officer 1, as instructed by his superior officers, disabled all known recording devices (video cameras and DVR). The officers stated that they reasonably believed that all surveillance systems had been rendered inoperable at that time. Once the camera systems had been made inoperative, many of the officers, including the two individual plaintiffs, removed their facial coverings, "let down their guard," and began communicating with one another as they would in a non-public setting outside the purview of the public. Unbeknownst to the officers, the Dispensary owners had placed hidden cameras in the Dispensary in anticipation that it would be raided. The Dispensary owners had neither obtained nor received the consent of the police officers to have their communications recorded. The hidden cameras secretly recorded the communications of the police officers, including Doe Officer 1 and Doe Office 2. The Dispensary owner later released edited portions of the

recordings to media outlets "in a manner to distort the officers[']actions and cause problems for both the involved officers and the City's enforcement actions."

The Santa Ana Police Department initiated an investigation after video recordings of the officers were released to the media. Before the interrogations of the subject officers, the officers watched selected portions of "the illegal recordings," and their respective counsel objected to the investigation on the ground it was "based solely on the illegal recordings." Their objections were rejected and they were ordered to proceeding with the interrogation or be subjected to discipline for insubordination."

Later, the Police Department obtained more footage from the recordings made at the Dispensary during execution of the warrant and, based on the additional footage, notified both officers of additional interrogations. Both officers reasserted their objections to the investigation on the ground "it was based on evidence obtained as the result of an unlawful recording of the officers." Counsel for Doe Officer 1 and Doe Officer 2 requested that Defendants provide materials pursuant to Government Code section 3303(g).

The City did not produce the requested materials. Both Doe Officer 1 and Doe Officer 2 were interrogated again. Before the interrogations and during breaks between interviews, representatives of Defendants confirmed that the interviews were based on "newly acquired recordings from the service of the search warrant."

Plaintiffs Santa Ana Police Officers Association (SAPOA) and the two officers sued the City of Santa Ana, the Police Department, and the Police Chief, alleging: (1) violations of the California Invasion of Privacy Act, Penal Code section 630 et seq., by using the video recordings made at the marijuana dispensary as the basis for, and as evidence in, the internal affairs investigation; and (2) violations of Government Code section 3303, subdivision (g) by refusing to produce tape recordings of the initial interrogations of the officers, transcribed stenographer notes, and any reports or complaints made by the investigators or other persons, before interrogating the officers a second time.

The trial court sustained Defendants' demurrer without leave to amend, and plaintiffs appealed. The appellate court affirmed as to the first claim, holding that no violation of the privacy statute could be stated because the officers had no reasonable expectation as a matter of law that their communications during the raid of the marijuana dispensary were not being overheard, watched, or recorded. "Objectively, a reasonable officer would expect that [his or her] conversations and conduct may be recorded by hidden cameras of an owner of a location where they are engaged in the on-duty execution of a search warrant."

However, the court reversed as to the second claim under POBRA. Under section 3303(g), Defendants were required to produce the tape recordings of the initial interrogations, transcribed stenographer notes, and reports and complaints made by the investigators or other persons, before Doe Officer 1 and Doe Officer 2 were interrogated a second time.