



BEST BEST & KRIEGER ^{LLP}
ATTORNEYS AT LAW

Labor & Employment Litigation Update

LOCC City Attorneys' Spring Conference
San Francisco, CA May 5, 2017

PRESENTED BY

Stacey N. Sheston
Partner

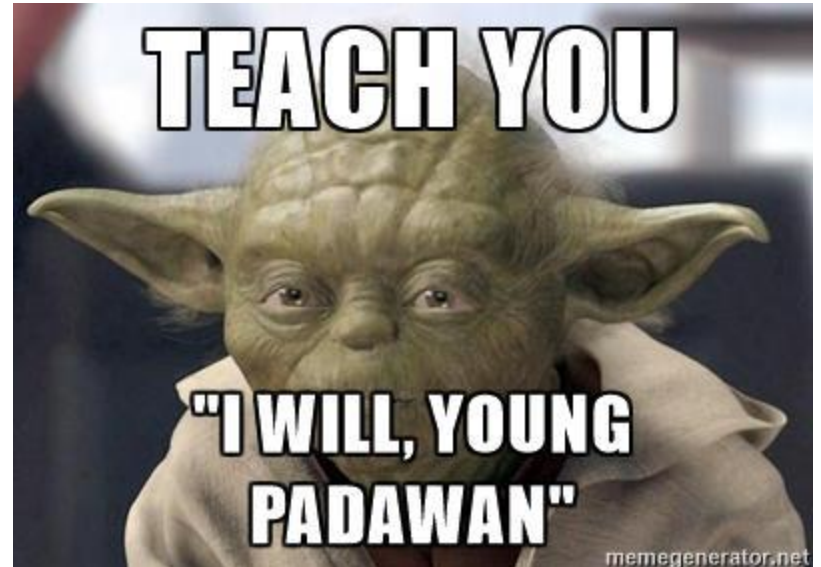


MAY THE
FOURTH
BE WITH YOU



Agenda

- Wage & Hour
- Discrimination/Harassment/Retaliation
- Disability/Medical Leave
- General Public Agency Employment Issues
(Discipline, POBR, PERB)



Wage & Hour



Nevada v. United States D.O.L.

2016 U.S. Dist. LEXIS 162048

- Issue: implementation of new salary threshold for exemptions under FLSA
- Preliminary injunction issued in November 2016 (prior to December 1, 2016 effective date)
- Stay rejected in January 2017
- Stay tuned.



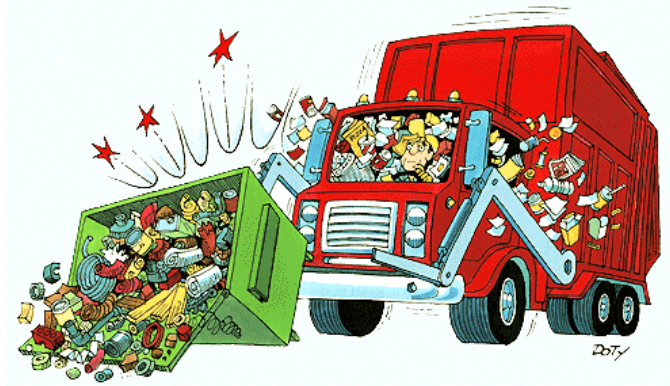
Discrimination/Harassment/ Retaliation



Santillan v. USA Waste

2017 U.S. App. LEXIS 6027 (9th Cir. April 7, 2017)

- Age discrimination and retaliation suit by former garbage truck driver (who communicated predominantly in Spanish)
- Had been terminated; settlement negotiated calling for reinstatement
- Employer's reason for not reinstating = failure to provide all necessary proof of right to work in the United States



Santillan v. USA Waste

2017 U.S. App. LEXIS 6027 (9th Cir. April 7, 2017)

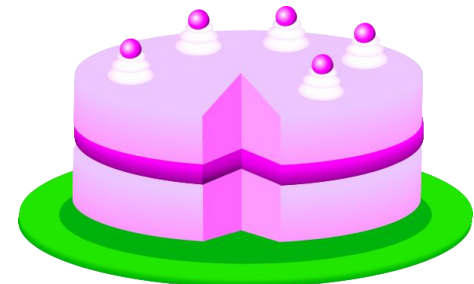
- Employer's MSJ granted by District Court, reversed on appeal
- *Prima Facie* case shown from circumstantial evidence
- Legally invalid basis for adverse action cannot support the employer's burden to show legitimate non-discriminatory reason for action



Mayes v. WinCo Holdings

846 F.3d 1274 (9th Cir. 2017)

- Mayes was fired for theft/dishonesty (relating to giving day-old bakery cakes to work crew, allegedly in compliance with accepted practice.)
- Sued for gender discrimination, and WinCo won summary judgment based on legitimate business reasons supporting the termination



Mayes v. WinCo Holdings

846 F.3d 1274 (9th Cir. 2017)

- 9th Circuit reversed- direct evidence of illegal animus included:
 - Supervisor didn't like it that "a girl" ran the freight crew
 - Supervisor said a man would be better as chair of safety committee
 - Plaintiff was replaced by a male employee with limited experience



YOU FAILED SO HARD

**THEY FELT IT IN A
GALAXY FAR, FAR AWAY**

Rizo v. Yovino

2017 U.S. App. LEXIS 7427 (9th Cir. April 27, 2017)

- County considered prior salary data as a factor in determining where to place employees on pay schedule
- Female math consultant challenged County's placement of male math consultants' salaries higher than hers
- County contended her prior salary (from Arizona) was the "factor other than sex" that caused that result



Rizo v. Yovino

2017 U.S. App. LEXIS 7427 (9th Cir. April 27, 2017)

- District Court: prior salary can never qualify as a “factor other than sex” - certified case for interlocutory appeal
- Ninth Circuit vacated/remanded for review under *Kouba*: prior salary can work if it “effectuates a business policy” and the employer uses it “reasonably” in light of stated purpose and other practices

Dinslage v. City & County of SF

5 Cal. App. 5th 368 (2016)

- Dinslage worked in programs for the disabled
- Major overhaul of recreation programs, changes in focus (integrated vs. separate)
He publicly criticized City for eliminating programs for the disabled community
- His position eliminated



Dinslage v. City & County of SF

5 Cal. App. 5th 368 (2016)

- Sued for retaliation under FEHA for having opposed discrimination against disabled people
- Held: retaliation claim under FEHA must be founded on opposition to an employment practice (not conduct towards general public.)



Disability/Medical Leave

A photograph of a "MEDICAL LEAVE REQUEST" form resting on a wooden surface. A black pen with a gold-colored tip is positioned on the form. The form includes sections for "Employee Information" with fields for "Name (Last)", "Address (Mailing Address)", "E-Mail Address", "First", "Last", "Phone", "Fax", "Mobile/Cell", and "Home". There is also a "Requested" field at the bottom.

Soria v. Univision Radio L.A.

5 Cal. App. 5th 570 (2016)

- Employee missed work or arrived late several times to attend medical appointments (requested and approved in advance).
- No physical symptoms interfering with job performance.
- Soria said she told supervisor about tumor/biopsy; supervisor said she had not

Soria v. Univision Radio L.A.

5 Cal. App. 5th 570 (2016)



- Terminated for repeated tardiness (at or after her ‘on-air’ show started)

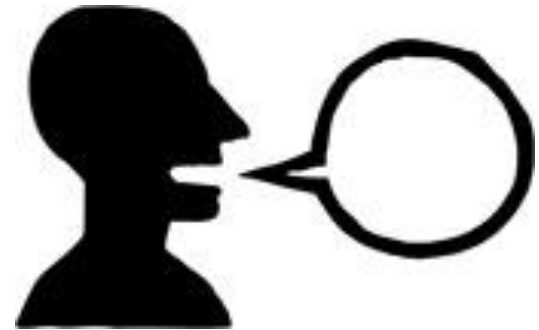
- Sued for FEHA disability claims and CFRA interference/retaliation
- MSJ granted –
 - No qualifying medical condition/disability under FEHA
 - No evidence of pretext
 - **Soria hadn’t given adequate notice for CFRA**



Soria v. Univision Radio L.A.

5 Cal. App. 5th 570 (2016)

- Held:
 - Verbal notice is ok – don't have to say CFRA/FMLA so long as reason (e.g. for medical treatment) is stated
 - Burden is on employer to then obtain permissible information to determine whether leave qualifies and parameters



Bareno v. San Diego Comm. Coll. Dist.

7 Cal. App. 5th 546 (2017)

- Issue: what constitutes sufficient notice of the need for continued CFRA leave?
- Called in sick, provided medical certification
- Return-to-work date passed, HR sent notice saying absence constituted voluntary resignation
- Employee called/emailed & provided two further certifications of continuing need for leave



TO WHOM IT MAY CONCERN

PLEASE EXCUSE-----

FROM WORK

FROM-----TO-----

DUE TO ILLNES



Bareno v. San Diego Comm. Coll. Dist.

7 Cal. App. 5th 546 (2017)

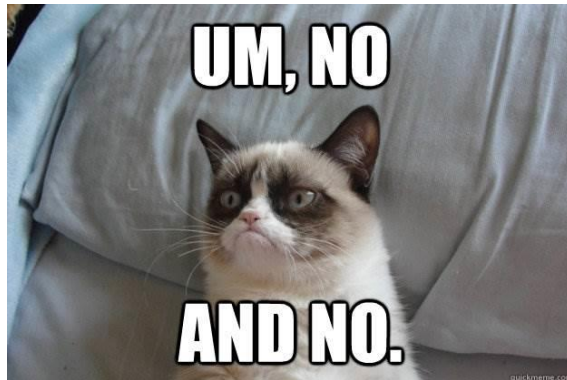
- Sued under CFRA for retaliation; trial court granted the College's MSJ
- Held: Reversed. Verbal notice is sufficient if employee communicates "as soon as practicable" with an underlying reason that qualifies under CFRA
- Takeaway: GOTCHA DOESN'T FLY!!!!



Featherstone v. So. Cal. Permanente Medical Group

2017 Cal. App. LEXIS 362 (April 19, 2017)

- Shortly after return from medical leave (no restrictions), employee resigned unexpectedly
- Subsequently sought to rescind resignation due to having been experiencing adverse reaction to medication at the time
- Company refused to allow rescission



Featherstone v. So. Cal. Permanente Medical Group

2017 Cal. App. LEXIS 362 (April 19, 2017)

- MSJ for employer granted and affirmed
 - Refusal to allow rescission ≠ “adverse employment action” (employment relationship is over)
 - No info showing employees who accepted resignation knew about temporary disability



Featherstone v. So. Cal. Permanente Medical Group

2017 Cal. App. LEXIS 362 (April 19, 2017)

- Reminder: absent some rule or contract provisions, public employee can withdraw resignation:
 - Before effective date
 - Before acceptance and
 - Without detrimental reliance by employer
- **SO ACCEPT AND ACT ON IT!**



Atkins v. City of Los Angeles

8 Cal. App. 5th 696

- Five trainees were injured during the academy
- Past practice: assign injured recruits to light duty until healed or permanently disabled.
- Then, Department required immediate medical clearance to return to the academy or be asked to resign/terminated



Atkins v. City of Los Angeles

8 Cal. App. 5th 696

- Jury found for the recruits (discrimination based on disability, failure to engage in interactive process, failure to provide reasonable accommodation)
- Held: temporary assignment to light duty not “unreasonable” as an accommodation based on past practice



**Darth Vader's rarely
photographed wife Ella...**

Ella Vader

General Public Agency and Labor



Thaxton v. State Personnel Board

5 Cal. App. 5th 681 (2016)

- Thaxton was fired and appealed to State Personnel Board
 - Didn't personally appear at the hearing
 - His attorney wouldn't accept service of subpoena
 - No explanation given
 - SPB dismissed his case
- Trial court granted Thaxton's writ petition, ordered reinstatement and back pay



Thaxton v. State Personnel Board

5 Cal. App. 5th 681 (2016)

- Held: “Failure to proceed” supports dismissal of his appeal



Perez v. City of Westminster

5 Cal. App. 5th 358 (2016)

- Issue: whether removal from collateral assignments (SWAT & honor guard) or not having trainee assigned constitute “punitive action” under POBR? (Trial court held it did not.)
- Chief lost confidence in Perez’ honesty and ability to work cooperatively with others.
- Standard of Review: substantial evidence





Perez v. City of Westminster

5 Cal. App. 5th 358 (2016)

- Key facts:
 - MOU says not being assigned a trainee is not discipline or punitive action
 - No loss of salary due to loss of collateral duties
 - Loss of “prestige” or ability to earn overtime not sufficient
 - Prior Notice of Intent’s “not sustained” finding placed in personnel file, but indications of removal from SWAT/honor guard were not

Riske v. Superior Court

6 Cal. App. 5th 647 (2016)

- Issue: Peace Officer Personnel Records
 - Records submitted by successful candidates and
 - Documents City relied on in selection decision
- City/Trial Court- 3rd party officers didn't witness/cause plaintiff applicant's injury



Riske v. Superior Court

6 Cal. App. 5th 647 (2016)

- Held: Evidence Code section 1043/1045 not limited to cases involving officers who witnessed or committed misconduct.

If officer's records are material to the subject matter of the litigation, they must be produced & reviewed *in camera* so court can order appropriate production (i.e. the normal *Pitchess* process)

Orange County Water Dist. v. PERB

8 Cal. App. 5th 52 (2017)

- Issue over “modified shop” union proposed be applied to new employees only
- District rejected union’s proposal, refused to hold an election after union filed petition
- Held: District violated Section 3502.5 by refusing consent to holding a properly petitioned-for agency shop election



Boling v. PERB

2017 Cal. App. LEXIS 329

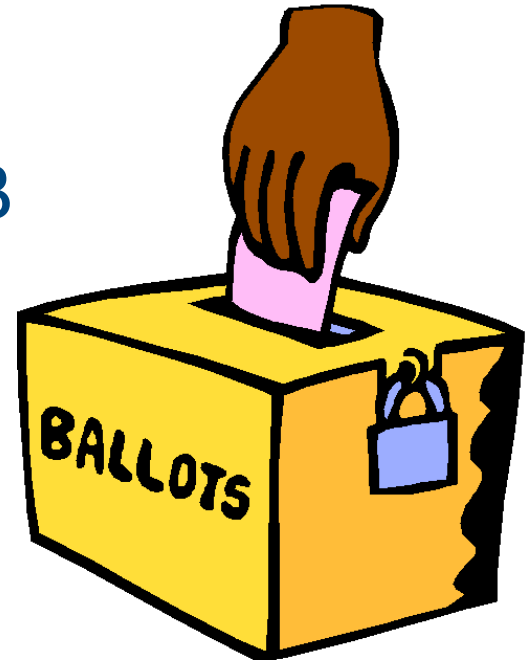
- Issue: duty to meet and confer before placing proposed charter amendment on the ballot
- Citizens Pension Reform Initiative (CPRI) in San Diego – passed a city charter amendment modifying employee pension plan.
- Employee unions filed unfair practice charge for failure to meet and confer before putting it on the ballot



Boling v. PERB

2017 Cal. App. LEXIS 329

- PERB found for the unions/ordered “make whole” remedy/disregard the CPRI changes.
- Court of appeal annulled the PERB order- need not meet and confer on citizen sponsored initiative ballot measures (as opposed to governing-body sponsored ballot measures)





Thank you for attending.

Stacey Sheston

Partner

Best Best & Krieger LLP

Phone: (916) 551-2099

Email: stacey.sheston@bbklaw.com

www.bbklaw.com