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ATTORNEYS AT LAW

Labor & Employment Litigation Update

LOCC City Attorneys' Spring Conference
San Diego, CA May 2, 2018

PRESENTED BY

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Agenda

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

Wage & Hour



Nevada v. United States DOL

275 F.Supp.3d 795 (E.D. Tex. 2017)

- Department of Labor (DOL) proposed a new overtime rule, increasing the salary threshold from \$23,660 to \$47,476 for employees to qualify as exempt
- Preliminary injunction in late 2016 prevented rule from moving forward
- Court invalidated new rule, holding that the significant increase of the salary threshold essentially rendered what tasks or duties an employee performed irrelevant



Nevada (cont'd)

- DOL appealed to the 5th Circuit
- DOL is crafting a new overtime rule – stay tuned



Discrimination/Harassment/ Retaliation



M.F. v. Pac. Peal Hotel Mgmt. LLC

16 Cal.App.5th 693 (2017)

- M.F. was a housekeeper at hotel
- Hotel's engineering manager saw trespasser on hotel property who was not a guest.
- Engineering manager did not tell him to leave or report his presence to the housekeeping staff



M.F. v. Pac. Peal Hotel Mgmt. LLC

- Trespasser approached one of the housekeepers while she was cleaning a room and tried to give her money in exchange for sexual favors; a maintenance worker gets him to leave
- Trespasser goes to another room, same offer; housekeeper closes the door and reports the incident to her manager



M.F. v. Pac. Peal Hotel Mgmt. LLC

- Housekeeping manager notifies other housekeeping managers & checks safety of the housekeepers in one building but not in the one in which M.F. was working
- M.F.'s supervisor checks the rooms on one floor but not on the floor in which M.F. was working



M.F. v. Pac. Peal Hotel Mgmt. LLC

- Trespasser forces his way into the room that M.F. was working and assaults her for two hours; nobody ever comes to check on M.F.'s whereabouts
- M.F. sues, alleging nonemployee sexual harassment and failure to prevent harassment from occurring
- Trial court entered judgment in favor of hotel, and M.F. appealed



M.F. v. Pac. Peal Hotel Mgmt. LLC

- Court of Appeal reverses- hotel had sufficient notice of the trespasser's conduct from his earlier actions and the reports that were made by the other housekeepers
 - Whether or not the hotel's corrective actions were sufficient would be a question of fact and thus should be considered by a jury

Nakai v. Friendship House Ass'n of Am. Indians

15 Cal. App. 5th 32(2017)

- CEO fired him after Nakai's wife disclosed that Nakai had a gun, was angry at Friendship House employees, relapsed into drug and alcohol abuse, and that she had a TRO against Nakai
- Nakai sued for marital status discrimination and failure to conduct an investigation
- Trial court granted MSJ for Friendship House; Nakai appeals; Court of appeal affirms



Nakai v. Friendship House (cont.)

- Nakai failed to establish a prima facie case of marital discrimination
 - Nakai claimed he was treated differently because he was married to the CEO's daughter
 - No protection for the status of being married to a particular person



Nakai v. Friendship House (cont.)

- No duty to investigate before discharging Nakai
 - Nakai was an at-will employee with no contractual rights to employment
 - Friendship House could discharge Nakai for any reason, so long as not an illegal reason



Perez v. City of Roseville

882 F.3d 843 (9th Cir. 2018)

- Plaintiff police officer released from probation, sued for gender discrimination, due process violations and 1983 civil rights violations (privacy and association rights) naming command staff employees
- Defendants prevailed on summary judgment as to all claims, including qualified immunity for individual defendants



Perez v. City of Roseville (cont.)

- 9th Circuit reversed as to the qualified immunity/1983 issue
 - Privacy issue – off-duty conduct
 - MSJ posture significant
- Ninth Circuit *sua sponte* requests for *en banc* briefing



Diego v. City of Los Angeles

15 Cal. App. 5th 338 (2017)

- 2 Hispanic police officers involved in fatal shooting of young African-American man
- Claimed they were “benched” – lost promotional opportunities and off-work duty
- Sued for race discrimination under FEHA
- Jury found for officers and awarded nearly \$4 million



Diego v. City of Los Angeles (cont.)

- REVERSED-- officers theory of disparate treatment turned on their race as well as race of the victim; claimed African-American officers would have been treated differently
- Jury should have been instructed not to consider race of the victim



Terris v. County of Santa Barbara

20 Cal. App. 5th 551 (2018)

- Terris was laid off and attempted to “bump down,” but County determined lower position required special skills she did not possess
- Complaint filed with civil service commission
 - Seniority rights violation in the layoff
 - Discrimination/retaliation
- Comm’n rejected layoff claim; didn’t rule on discrimination claim due to lack of EEO complaint (failure to exhaust)

The illustration shows a yellow complaint form with the title "COMPLAINT" in large orange letters at the top. Below the title, there are several sections for information: "TO:" with a line for the recipient; "WHOSE FAULT:" with checkboxes for "MINE", "YOURS", and "OTHER:"; "DESIRED OUTCOME:" with checkboxes for "APOLOGY", "EXPLANATION", "LITIGATION", "PROMOTION", "RESTITUTION", and "CHANGE"; and "COMPLAINANT:" with a line for the name. There is also a checkbox for "ANONYMOUS" at the bottom right. The form has a simple, clean design with orange and black text on a yellow background.

Terris v. County of Santa Barbara (cont.)

- Terris sued for 1102.5 retaliation; as well as retaliation and sexual orientation discrimination under FEHA
- Appeals court affirmed on exhaustion of admin remedies (*Campbell* rule) – Labor Code section 244 excuses exhaustion only for claims with Labor Commissioner



Rizo v. Yovino

854 F.3d 1161 (9th Cir.), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 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 (cont.)

- REVIEW:
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

Rizo v. Yovino (cont.)

- *En banc* panel affirmed trial court's denial of summary judgment
- Held: prior salary (alone or in combination with other factors) cannot justify a wage differential between male and female employees.
- Overruled *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982)

Rizo v. Yovino

- “Any other factor other than sex” is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance.
- 9th Circuit’s new rule differs from 7th Circuit rule, which is that salary history is always a “factor other than sex”



Back to Basics

- How good is your training?
- Is your complaint process accessible and user-friendly?
- Consistent/fair enforcement?
- Communications training - how to give clear direction & feedback; discussing hard topics; formal and informal



Set the Tone

- Model and demand a professional environment – lead by example
- No tolerance for bullying/disrespectful behavior
- Address the “small stuff” before it becomes “big stuff”



Disability/Medical Leave



Cornell v. Berkeley Tennis Club

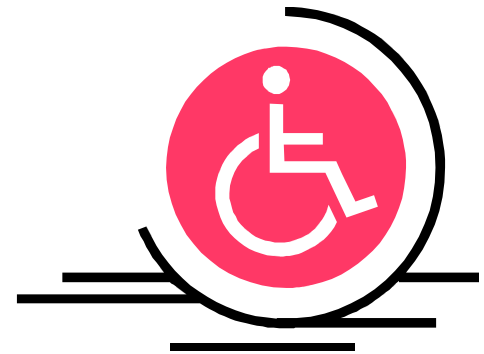
18 Cal. App. 5th 908 (2017)

- Cornell worked at the tennis club as a manager
- New GM commented about her size & gave others preferential treatment
- Employee filed a grievance
- The GM accused her of secretly trying to record a Board meeting; she was fired.



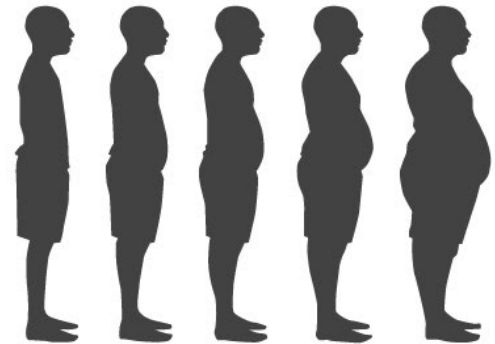
Cornell (cont'd)

- Cornell sued for disability discrimination and failure to accommodate under FEHA.
- Employer won MSJ
- Reversed in part.
 - Obesity must have a physiological cause to constitute disability. (Employer did not establish the absence of such a cause, so no MSJ)



Cornell (cont'd)

- Obligation to accommodate based on actual disability requires the employer to know of the physiological cause. (Employer did not know, so the employee's accommodation claim failed)



Cornell (cont'd)

- Ensure consistent treatment of all employees.
- Different result had the employee pursued “perceived as” disability discrimination and failure to accommodate claims?



General Public Agency and Labor



Riske v. Superior Court

6 Cal. App. 5th 647 (2016)

- REVIEW: Peace officer personnel records sought
 - Records submitted by successful candidates and
 - Documents City relied on in selection decision
- 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)

Riske v. Superior Court

___ Cal. App. 5th ___, (2018 WL 1789937 April 16, 2018)

- Trial court conducted *in camera* review of the records
- Based on section 1045(b)(1) (complaints concerning conduct 5+ years before the event in the litigation) court redacted items concerning conduct 5+ years before Riske filed suit
- Riske sought another writ



Riske v. Superior Court (cont.)

- Held: 1045(b), which prohibits disclosure of stale complaints against police officers, has no application to the personnel reports sought in this case



Corley v. San Bernardino County Fire Protection District

21 Cal. App. 5th 390 (2018)

- Battalion Chief Corley (with positive evaluations and no significant disciplinary history) fired by fairly new fire chief for “incompatible management style”
- Corley sued for age discrimination
- Jury awarded nearly \$600k in damages, \$850k in attorneys fees, \$40k in costs



Corley v. San Bernardino County Fire Protection District

- District appealed – had wanted jury instruction per Gov't Code 3254(c)
- Appeals court affirmed – 3254(c) only applies to the actual head of the fire agency (i.e. the Fire Chief) rather than to subordinate battalion chiefs



Vallejo Police Officers Ass'n v. City of Vallejo

15 Cal. App. 5th 601(2017)

- 2009 MOU capped City's contribution to health coverage at 100% of Kaiser rate
- 2012 City began negotiating to reduce City's share of retiree medical costs to \$300 per month
- Bargained to impasse;
City imposed the \$300 monthly contribution



Vallejo Police Officers Ass'n v. City of Vallejo (cont.)

- VPOA filed a writ alleging bad faith bargaining and vested right to 100% Kaiser rate
- Trial court denied the writ – declined to order new negotiations or reinstate the former benefit



Vallejo Police Officers Ass'n v. City of Vallejo (cont.)

Affirmed: MOU doesn't create vested right absent "clear showing" of entity's intent to create such a right (either from contract language or convincing extrinsic evidence)



*Alameda County Deputy Sheriff's Assn' v.
Alameda County Employees' Retirement Ass'n,*

19 Cal. App. 5th 61, rev. granted, 230 Cal. Rptr. 3d 681 (March 28, 2018)

- Consolidated actions challenging the exclusion of on-call, standby and terminal pay from the calculation of pension benefits for “legacy” employees.



Alameda County (cont.)

- Claimed PEPPRA could not impair the pension benefits promised to legacy employees under the “California Rule”



Alameda County (cont.)

- Trial court - PEPRA didn't change the law. The pension systems could not include those disputed pay prior to PEPRA, so legacy employees never had a "vested" right to the inclusion of those pay items
- Appellate court held PEPRA did change the rules regarding inclusion of various elements of "compensation earnable"

Alameda County (cont.)

- Held: detrimental changes to pension benefits for legacy members without corresponding new advantages must be justified by compelling evidence that the changes bear material relation to the theory/operation of a successful pension system
- Remand to trial court to determine vested rights issue; *review granted March 2018*

Thank you for attending.

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