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THE LABOR BEAT

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CARROLL BURDICK LABOR ATTORNEYS NAMED TOP ATTORNEYS

A big congratulations to Labor Partners **Gary Messing, Gregg Adam, Jason Jasmine, Jonathan Yank** and Labor Associate **Jennifer Stoughton** for being recognized as top attorneys within their field. Gary was named the California Employment Lawyer of the Year by Corporate International Global Awards and Gregg was selected as the only union-side lawyer to the Top 20 Municipal Lawyer in California by the *Daily Journal.* In 2013, Gary was also all named a Northern California Super Lawyer in the California *Super Lawyers Magazine* while Jason, Jonathan and Jennifer were all nominated by their peers as Northern California Super Lawyers' Rising Stars. This was Gary's tenth selection as a Super Lawyer, Jason and Jonathan's fourth, and Jennifer's first year as a Rising Star. Each year, fewer than five percent of the lawyers in the state receive the Super Lawyers designation, while less than two-and-a-half percent of lawyers under the age of 40 receive the Rising Star designation. Congratulations to all.

BIG WIN IN THE FIGHT TO PROTECT PENSIONS: SAN JOSE'S MEASURE B RULED UNCONSTITUTIONAL

In a big win for public sector employees and Carroll Burdick, a Santa Clara County Superior Court judge ruled that the City of San Jose's attempt to increase employee pension contributions and reduce retirement benefits unconstitutionally impaired San Jose employees' vested pension rights. Judge Patricia M. Lucas's decision invalidates the key components of "Measure B," a ballot measure touted as a fiscal necessity that was really a politically-motivated attack on public employees led by San Jose Mayor Chuck Reid. The lead plaintiff, the San Jose Police Officers Association, is represented by Carroll, Burdick & McDonough. Labor Partner **Gregg Adam** was assisted by Appellate Partner **Gonzalo Martinez** and Labor Associate **Amber Griffiths.**

The Court ruled that the City of San Jose cannot impair the vested rights of its employees based on "reservation of rights" language in the City Charter. It further ruled against the City's attempt to saddle employees with the costs of its unfunded pension liabilities, striking language that would have required employees to contribute to the unfunded liability of the City's general pension fund. The judge also ruled in the employees' favor in the protection of Cost of Living Adjustments. In addition, she ruled against the City's attempt to force employees to pay more for their current pension plan or be forced into one with more limited benefits.

According to the Court, certain changes—such as modification to disability retirement benefits—were permissible as modifications not disturbing rights of employees to enjoy a "substantial or reasonable pension." Also, although the Court upheld the "poison pill" language in the measure, which states that the City can initiate pay cuts if any portion of the measure is ruled invalid, the City gains nothing with this. SJPOA members are being informed that this ruling cannot touch their wages based on protections under a two-year Memorandum of Understanding.

STRANGE BEDFELLOW: JUSTICE ANTONIN SCALIA DEFENDING THE RIGHT OF PUBLIC SECTOR LABOR UNIONS TO COLLECT FAIR SHARE/AGENCY FEES FROM NON-MEMBERS

By Gregg Adam

On January 21, 2014, the United States Supreme Court heard oral argument in a rather important case called *Harris v. Quinn.* The facts of the case seem fairly innocuous: a group of Illinois home healthcare workers are suing the Governor of Illinois and a labor association. Their gripe is that, under Illinois law, home healthcare workers are designated as state employees for purposes of being subject to Illinois' collective bargaining laws. One of those laws allows the union that is the elected exclusive representative for the bargaining unit that includes home healthcare workers to collect agency or fair share fees from workers who choose not to join the union.

Fair share or agency fees have always been something of a contentious issue. The terms are

largely interchangeable—they are fees that a labor union may charge employees who do not join the union for the costs of representing the non-members. California, like other states, requires unions to bargain for and represent all those in the bargaining unit, members of the union and non-members alike. All California public sector bargaining laws have such clauses—usually they require agreement with the employer—but the Meyers-Milias-Brown Act, which governs labor relations between California municipalities and special districts and their employees, allows agency fee agreements to be created by majority vote of the members of the bargaining unit (excluding management employees). Generally they are justified as harmonizing labor relations and preventing non-members from "free-riding"—enjoying the benefits the union produces, such as pay and benefit increases—without contributing to it.

The argument against agency fee arrangements in the public sector is that having the State (through the collective bargaining law) require a public employee who does not join a union pay fees to the union violates that employees' free speech rights and thus the First Amendment.

In response to that line of argument, however, since at least the seminal 1977 decision in *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, the Supreme Court has harmonized between these two competing interests this way: a public sector labor union must deduct from the fee it charges non-members (with the starting point being the same amount charged to members) any amounts attributable to political activity and other non-chargeable activities. (The mechanisms through which unions accomplish this can be complicated and need not be delved into here.)

As innocuous as *Harris v. Quinn* sounds, union-side practitioners fear it may be used by the Supreme Court to dramatically rewrite the laws governing agency fees and perhaps to prohibit them altogether. The Supreme Court could require that all dues and fees be collected on an "opt-in" basis, as opposed to an "opt out" basis, or could strike down the payment of agency fees altogether. This fear arises from another recent decision by the Court (a 2011 case called *Knox v. SEIU* (2012) 132 S.Ct. 2277, which involved fees SEIU raised from California state employees to oppose Governor Schwarzenegger's 2005 anti-union Special Election propositions, in which the five-member conservative majority, led by Justice Samuel Alito, made extremely pointed statements in the decision that appeared to be inviting challenges to the current law regarding agency fees. In fact, there is little doubt the *Harris* challenge was brought by the National Right to Work Foundation for the purposes of giving the Supreme Court a chance to act on what it had invited in *Knox.* (That same Virginia-based group has brought at least one California challenge already in federal court challenging the procedures through which California law permits agency fees to be administered.)

Imagine court followers' surprise to read in the post-argument reports that Justice Scalia, long recognized as the (self-anointed) intellectual leader of the conservative majority, was seemingly staking out a position defending the right of the union to collect agency fees. Scalia took issue with the challengers' position that when a public employee union advocates for better wages and working conditions, that, in and of itself, necessarily involves trying to change public policy, which might take it into the First Amendment realm. Scalia wondered aloud whether the union was simply pushing for better working conditions for those whom it represents. He also openly acknowledged prior decisions of the Court (including ones he has written) upholding agency fees against constitutional challenges, telling one lawyer, "What our cases say is you can be compelled not to be a free rider, to pay for those items of bargaining that benefit you as well as everybody else."

Most court observers see the case turning on whichever side Justice Scalia ultimately comes down on. We expect a decision from the Supreme Court by June, so stay tuned.

THE ATTACK ON AGENCY FEES CONTINUES: GOP-BACKED BILLS ACROSS THE COUNTRY SEEK TO LIMIT COLLECTION OF AGENCY FEES

By Amber Griffiths

In another example of the attacks on agency fees, bills introduced in both houses of Congress aim to diminish unions' rights to collect agency fees and hold elections. The Employee Rights Act was introduced in the Senate by Health Education Labor and Pensions Committee members Orrin Hatch, R-Utah, and Lamar Alexander, R-Tenn. A companion bill was introduced in the House by Rep. Tom Price, R-Ga. Together, they would require an individual member's consent before his/her dues can be put toward any purpose other than collective bargaining, and require unions to provide more audited information to agency fee payers regarding union finances, including audited financial statements.

The bills also would require all unionized workplaces with more than 50 percent employee turnover to hold secret ballot recertification elections to determine whether a majority of employees still want to be represented by the union, and a secret vote for any union considering a strike to determine whether to do so. And, in an obvious attempt to undermine the NLRB's recent efforts to overhaul an array of labor law instituted by the NLRB's board under the prior administration, Other parts of the bills would curtail recent rule-making by the NLRB regarding union elections. The bills also would impose a penalty on unions found to interfere with filing a decertification petition under the NLRA. Finally, the proposed changes would provide that members and non-members alike may vote on the ratification of a collective bargaining agreement or on whether to engage in a strike.

At the same time that both houses of Congress debate these bills, GOP members in some state legislatures also have introduced bills limiting collection of agency fees. For example, a bill being debated in the Pennsylvania legislature would ban paycheck deduction of not only agency fees but also dues. The bill would not apply to public safety workers and their unions. Last September, an Indiana state court struck down "right-to-work" legislation; the case is now pending before the state supreme court. Meanwhile, in the state of Washington, the legislature is debating a bill that would eliminate union membership annual opt-out procedures, requiring unions to assume that an employee who opted out from membership last year will continue to do so unless the worker notifies the union. Maine's Republican Governor LePage recently added to his re-election platform a proposal to create business zones in Maine where agency fees would be banned, along with other measures (tax and utility reductions), in an attempt to attract private companies to start new businesses. This is an apparent follow-up to the state legislature's rejection of two GOP-backed bills that had aimed to make Maine the 25th state with "right to work" laws.

SUPREME COURT HOLDS UNION CAN BARGAIN AWAY RIGHT TO COMPENSATION FOR "CHANGING CLOTHES"

By Jason Jasmine

For much of the last decade, "donning and doffing" lawsuits have been brought around the country with varying degrees of success. Very generally, "donning and doffing" refers to the putting on and taking off of clothes, equipment and protective gear that employees in certain industries are required to wear during their workday. Questions arise concerning when, where, and how long it takes employees to "don" and "doff" such gear, and what—if any—portion of the time spent in these activities is compensable. In *Sandifer, et al. v. United States Steel Corp.* (2014) 134 S.Ct. 870, the U.S. Supreme Court attempted to bring some degree of clarity to a couple of the larger issues faced by litigants in donning and doffing matters.

The plaintiffs were a group of employees of steelmaking facilities seeking back pay for the substantial amount of time spent donning and doffing protective gear required to be worn in a steel plant. Such time is typically compensable under the Fair Labor Standards Act. The Supreme Court,

however, confirmed that 29 U.S.C. section 203(o) allows parties to decide, as part of a collective-bargaining agreement, that "time spent in changing clothes … at the beginning or end of each workday" is non-compensable. The parties were subject to a collective bargaining agreement that contained such an exclusion; thus, the question became whether the time spent donning and doffing the gear at issue here constituted "changing clothes" for purposes of the exclusion.

The Supreme Court pulled out their 1949 (the year the provision was added to the law) dictionaries to look at the definition of "clothes," and held that in this case, most of the gear the plaintiffs were required to don and doff met the definition of "clothes." Thus the entire period of time was non-compensable under the parties' collective bargaining agreement. If the employees had devoted the majority of the time in question to putting on and taking off safety gear or other non-clothes items, then the entire period would not qualify as time spent changing clothes and would have been compensable.

There are a few important things to take from this case:

1. Employers and unions can negotiate collective bargaining agreements that treat "changing clothes" as non-compensable, even when that time would otherwise be compensable under the FLSA.
2. Rather than taking an item-by-item approach, in order to determine whether the time is being spent "changing clothes," courts are to look at the activity as a whole and determine whether the majority of the time is spent changing clothes or donning and doffing protective gear.
3. In order to determine the answer to #2, courts are still going to have to engage in a somewhat fact-specific analysis of the activity at issue.
4. While most discussion of this case is likely to focus on the fact that time spent changing clothes is not compensable, the case does not really do much to change the existing law, nor does it address issues such as whether time spent walking to a workstation after donning and doffing may be compensable (even when the donning and doffing itself is not).

FIRST APPELLATE COURT DECISION UNDER THE FIREFIGHTERS' PROCEDURAL BILL OF RIGHTS ACT IS A VICTORY FOR FIREFIGHTERS

By Jason Jasmine

In 2007, the California Legislature enacted the Firefighters Procedural Bill of Rights Act ("FFBOR"), which provided firefighters throughout California with a set of protections similar (and, in many respects, identical) to those protections provided to peace officers under the Public Safety Officers' Procedural Bill of Rights Act ("POBRA"). It was not until the end of 2013, however, that the California Court of Appeal issued a published decision squarely focused on interpreting a provision of the FFBOR. (*Poole v. Orange County Fire Authority* (2013) 221 Cal.App.4th 155).

In this case, the Court of Appeal ruled that the Orange County Fire Authority violated the FFBOR when a fire captain maintained daily logs containing adverse comments on the activities of a firefighters for use in performance evaluations without the firefighters having the opportunity to review and submit a written response to those comments.

The FFBOR (like the POBRA for peace officers) provides that a firefighter shall not have "any comment adverse to his or her interest entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer, without the firefighter having first read and signed the instrument containing the adverse comment indicating he or she is aware of the comment…" Poole's fire captain kept a separate file at the fire station on each of the firefighters he supervised. He characterized those files as "daily logs" documenting the activities of the firefighters, and these logs were kept solely for personnel purposes—for the fire captain's use in preparing yearly evaluations (or

evaluations required by a performance improvement plan).

Poole was unaware of any adverse comments in this file maintained by the Fire Captain until he received his yearly evaluation. Even then, he was only informed of the adverse comments that actually made it into the evaluation. It was not until his representative demanded to see all of the adverse comments that he was finally able to see all of them (in some cases, a year-and-a-half after the adverse comments were made). Poole had never previously seen the comments, nor was he provided the opportunity to sign an acknowledgement of receipt of such comments, nor was he provided any opportunity for a written response.

In a unanimous decision, the Court of Appeal concluded that because these "daily logs" were used for personnel purposes, the files were subject to the protections of the FFBOR. It defeats the purpose and intent of the FFBOR if firefighters cannot review and respond to adverse comments until their yearly evaluation. The Court of Appeal specifically noted that Poole could not be expected to remember the details underlying the adverse comments "months and months" later when he was finally made aware of the adverse comments in the course of his yearly evaluation. Thus, Poole was entitled to review and respond to any adverse comments contained in those daily logs immediately.

This case is currently under review by the California Supreme Court.

PUBLIC AGENCIES CANNOT TAKE ACTION AGAINST A PEACE OFFICER SOLELY BECAUSE THE OFFICER'S NAME IS ON A *BRADY* LIST

By Amber Griffiths

A new amendment to the Public Safety Officers Procedural Bill of Rights bans public agencies from disciplining, firing, demoting, or denying a promotion to a peace officer merely because a "*Brady* list" includes the peace officer's name. *Brady* lists are maintained as a result of *Brady v. Maryland* (1963) 373 U.S. 83, under which a criminal prosecutor must disclose the name of any testifying peace officer whose conduct (or omission) could impact credibility findings.

The amendment, effective January 1, 2014, also covers peace officers whose names do not appear on such a list, but may be subject to disclosure pursuant to *Brady.* The amendment does not prohibit agencies from disciplining peace officers for the underlying conduct or omission that led to inclusion of the peace officer's name on the *Brady* list. If such conduct is proven, the evidence that a peace officer's name was placed on a *Brady* list can only be used for the sole purpose of determining the type or level of punitive action to be imposed.

CHP OFFICER GETS DISABILITY RETIREMENT FOR INABILITY TO PERFORM FULL OFFICIAL DUTIES

By Gary Messing

After 23 years of employment, Highway Patrol Officer Perry Beckley applied for disability retirement after he began to suffer wrist and back problems. He had filed worker's compensation claims and had taken time off periodically, until his chiropractor concluded that he was medically prevented from performing the "14 Critical Tasks" required by the CHP of Highway Patrol Officers. He took a service retirement pending an application for disability retirement.

CalPERS denied his retirement application, relying on the fact that the last assignment that Beckley had at the highway patrol was as the Public Affairs Officer (PAO). CalPERS concluded that Beckley's medical conditions did not prevent him from performing the duties required of a PAO.

Beckley sued and won at the trial court and his victory was affirmed by the Court of Appeal, where the ruling was that he had a vested right to a disability pension, if he is, in fact, disabled. In order to be disabled, he has to be substantially incapacitated from performing his usual duties. Several medical specialists had examined Beckley and found that he was disabled from performing the full range of the normal duties of a Highway Patrol Officer. Because he cannot perform the "14 Critical Tasks" at all times, he was disabled, even

though in his position as a PAO he would not normally be required to perform those tasks at all times. The Court noted that he might, from time-to-time, have to drag a 200-pound victim from a vehicle, lift or drag the victim 50 feet, physically subdue and handcuff a combative subject, change a flat tire, drive for periods of time, etc. The Court also noted that measuring a disability based upon the duties an officer had to perform in his last assignment could lead to inconsistent results based solely upon the officer's last assignment.

SUPERIOR COURT RULING LIMITS FACTFINDING UNDER MMBA TO DISPUTES ARISING AFTER CONTRACT NEGOTIATIONS

By Amber Griffiths

Recently, a trial court ruled against the Public Employment Relations Board's ("PERB") rule that factfinding under the Meyers-Milias-Brown Act ("MMBA"), as set forth in AB 646, applies to effects bargaining. In *County of Riverside v. PERB (SEIU Local 721),* the County argued that factfinding is limited to disputes arising from collective bargaining for a new or successor MOU, and therefore, fact-finding does not apply to effects bargaining regarding recent changes to background investigations. The trial court agreed after determining the legislative intent of AB 646 indicates MMBA factfinding applies only to contract disputes. The ruling also included injunctive relief, which: (1) required PERB to dismiss all factfinding cases arising from disputes after negotiations of single meet and confer issues; and (2) restrained PERB from granting any such new factfinding request. This ruling cannot be cited as precedent, but PERB is likely to appeal and an appellate ruling may establish precedent. A ruling affirming the trial court's decision would also overturn a prior ruling by PERB that meet and confer negotiations over effects of layoffs were subject to factfinding.

Unfortunately, another recent decision out of the San Diego Superior Court agreed with the Riverside Court. We will keep you updated as this area of law develops.

NEW FEDERAL APPELLATE DECISION ON FIRST AMENDMENT RIGHTS OF POLICE OFFICERS RAISING SAFETY CONCERNS

By Gregg Adam

According to its recent decision in *Hagen v. City of Eugene* (9th Cir. 2013) 736 F.3d 1251, the Ninth Circuit Court of Appeals does not believe that a police officer who raises concerns about the accidental discharge of weapons on a SWAT team is protected by the First Amendment. While the Court acknowledged that the issue was one of public concern, it concluded that, because the officer exclusively raised his concerns within his chain of command, his speech was not constitutionally protected.

The case concerned the SWAT team at the Eugene Police Department. It had been plagued, since the late 1990s, in the words of the court, by officers "negligently discharging firearms." After further incidents in 2007, Officer Hagen became the point person for complaints by officers. His complaints caused friction with his supervising sergeant, who subsequently transferred him out of the K-9 unit, admitting that, in part, it was because Hagen was a "spokesman for the majority of the complaints." The police chief subsequently reversed that transfer.

Undeterred, the sergeant began documenting perceived performance deficiencies with Hagen and ultimately put him on a performance improvement plan. Significantly lower performance evaluations followed. An investigation into the K-9 unit followed and Hagen (again) and two other officers were transferred out of the unit. The two other officers were subsequently permitted to rejoin the unit, but Hagen was not.

Hagen subsequently sued the City, the Chief, the investigating lieutenant, and his supervising sergeant under 42 USC section 1983 for violation of his constitutional rights. A jury found that Hagan had been deprived of his First Amendment right of free speech and awarded him $250,000 in compensatory and punitive damages.

The Court of Appeal reversed. It reiterated that while the First Amendment shields public employees from employment retaliation for their protected speech, it also recognizes the state's interests, as an employer, in regulating the speech of its employees. Courts achieve this balance by asking five questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

The Court of Appeal focused on the jury's finding that Hagen's speech was protected because he spoke as a private citizen. It restated prior Supreme Court case law holding that public employee speech is not protected when it is made pursuant to the employee's official job responsibilities. As it quoted, "speech which owes its existence to employees' professional responsibilities is not protected by the First Amendment."

The Court seems to suggest a higher standard for law enforcement personnel to establish that workplace speech is protected: "Generally, in a highly hierarchical employment setting such as law-enforcement … when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job." But it left the door open if the officer takes his or her concerns to persons outside the workplace in addition to raising them up the chain of command. One case highlighting this distinction is *Freitag v. Ayers* (9th Cir. 2006) 468 F.3d 528. There, whereas a prison official's internal reports of inmate sexual misconduct was spoken as a public employee and, therefore, unprotected, her external reports about the same conduct to a state senator and the state Inspector General were as a citizen and the speech was, therefore, protected.

Applying the facts of the case to this body of law, the Court of Appeal concluded that the evidence established that Hagen's concerns were directed to his coworkers and his superior officers and therefore he had not established a constitutional violation.

The lesson of Hagen would appear to be that if a police officer (or for that matter any employee) is planning to raise issues within his or her chain of command that could create a public controversy, and he/she fears retaliation, he/she should also raise the issues with some external person or body outside of his/her chain of command in order to maximize the likelihood that the speech will be found to be constitutionally protected.

DETROIT BANKRUPTCY RULING MAY REVERBERATE ALL THE WAY TO CALIFORNIA

By Jennifer Stoughton

In a ruling with potential implications for California public sector unions, a federal bankruptcy judge in Michigan ruled this week that Detroit is eligible to declare bankruptcy and that Detroit's pension obligations would be treated the same as any other contractual obligation for bankruptcy purposes. The Court found that public employee pensions are not protected in federal Chapter 9 bankruptcy proceedings, even though, in this instance, the Michigan Constitution expressly protects them. Specifically, the judge stated, "Pension benefits are a contractual right and are not entitled to any heightened protection in a municipal bankruptcy." Thus, the Court opened the door for Detroit to decrease its pension obligations to current employees and current retirees as part of a Court-approved bankruptcy reorganization plan.

While this decision is concerning, we do not believe it will cause public entities in California to suddenly rush out and declare bankruptcy to avoid pension obligations. First, the judge made it clear that Detroit's fiscal condition was extremely dire. The City is $18 billion in debt, has lost hundreds of thousands of residents, has only a third of its ambulances functioning, and its police department closes less than

nine percent of cases due to understaffing. We are not aware of any city in California that is in such dire financial straits, even among those (San Bernardino, Vallejo and Stockton) that have already declared bankruptcy. Second, it is unclear whether the Court ultimately will approve any decrease to current retirees' pensions because Detroit is still obligated to pay everything that it can pay. Thus, the practical effect of this decision remains to be seen. Finally, whether the reasoning employed by the Court would apply to a California public entity remains unclear. California, under Assembly Bill 506 (passed October 9, 2011), has strict procedural requirements public entities must adhere to before declaring bankruptcy, as well as decades of case law upholding the inviolability of public pensions.

COURT REAFFIRMS THAT COLLECTIVE BARGAINING AGREEMENTS DO NOT WAIVE INDIVIDUAL EMPLOYEE'S RIGHT TO JUDICIAL FORUM

By Jennifer Stoughton

In *Volpei v. County of Ventura* (2013) 221 Cal.App.4th 391, the Second District Court of Appeal reaffirmed the long-standing rule that, absent a clear and unmistakable waiver, a collective bargaining agreement does not waive an individual employee's right to a judicial forum. The case arose after a County of Ventura employee filed a complaint against the County for retaliation, harassment, disability discrimination, and other claims, pursuant to the California Fair Employment and Housing Act ("FEHA"). In response to the complaint, the County sought to compel the employee to arbitrate his claims pursuant to the collective bargaining agreement between the County and the employee's union, the Ventura County Deputy Sheriffs' Association. While recognizing that public policy generally favors arbitration, the Court found that the presumption does not apply when an employee seeks to litigate a statutory claim. Instead, the arbitration provisions for such claims must be "particularly clear." Here, the collective bargaining agreement grievance procedure only provided that an unresolved grievance "may be submitted to arbitration" by the Association. The Court concluded that this term was "permissive and unilateral" and did not establish the clear and unmistakable waiver necessary to overcome the presumption that collective bargaining agreements do not waive individual rights to a judicial forum.

WHISTLEBLOWER PROTECTIONS EXPANDED IN 2014

By James Henderson and Jason Jasmine

Late last year, Governor Brown signed a significant expansion to the Whistleblower Protection Act, which became effective January 1, 2014. Prior to the expansion, whistleblower protection applied only to actions by the employer against employees for whistleblowing activities pertaining to the employer's violation of a state or federal statute or violation or noncompliance with a state or federal rule or regulation. Additionally, such protection applied only to situations where an employee reported the violation or noncompliance to a government or law enforcement agency. Finally, until the expansion, case law had interpreted the prior Act to not provide protection for reporting if reporting was part of the employee's job duties.

As of January 1, 2014, however, California law also protects reporting violations or noncompliance of a local rule or regulation; reporting violations or noncompliance to any "person with authority over the employee or to another employee who has authority to investigate, discover, or correct the violation or noncompliance," even internal reporting; and whistleblower protection also now applies "regardless of whether disclosing the information is part of the employee's job duties." Thus, even if the employee's duties require him or her to report violations or noncompliance, that activity is still subject to protection.

COURT OF APPEAL RULES THAT CLAIMS BROUGHT UNDER THE WHISTLEBLOWER PROTECTION ACT ARE EXEMPT FROM THE GOVERNMENT CLAIMS ACT

By Lina Balciunas Cockrell

California state law generally requires filing a claim under the Government Claims Act (in addition to exhausting other applicable administrative remedies) prior to bringing a lawsuit for damages against a public entity in Superior Court. However, in the case of *Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, the California Court of Appeal ruled that causes of action brought pursuant to the Whistleblower Protection Act ("WPA") (Gov. Code §§ 8547 et seq.) are not subject to the Claims Act procedure. Prior to *Cornejo,* the only claims exempt from the Claims Act were those arising under the Fair Employment and Housing Act ("FEHA"), because the structure of the FEHA, with early investigation and opportunities for settlement, promotes the same objective as the Claims Act. The Court of Appeal concluded that the WPA has a similar structure: there is an exhaustion requirement of filing an administrative complaint with the State Personnel Board ("SPB") within 12 months of an incident of retaliation before filing an action in court for general and punitive damages; the SPB then may either dismiss the complaint, refer it for investigation or schedule an informal hearing; the SPB must then issue findings, which are deemed final and allow the complainant to take the next step of pursuing judicial remedies. Therefore, these procedures under the WPA provide the public agency with early notice of the existence of the claimant, the facts underlying the claim, the theories of the claim, and the amount of damages sought. The WPA further provides for early investigation of the merits of a claim and the SPB has the power to enforce a violation of the WPA. This procedure also tends to promote early settlement. Therefore, the Court of Appeal concluded that the SPB proceedings fulfill every function of filing a claim under the Claims Act and claims under the WPA are thus exempt from the Claims Act.

NINTH CIRCUIT HOLDS THAT WHISTLEBLOWING LAW ENFORCEMENT OFFICER MAY BE ENTITLED TO FIRST AMENDMENT PROTECTION

By Lina Balciunas Cockrell

In a major victory for law enforcement officer protections, the Ninth Circuit Court of Appeals overturned earlier case law providing that an officer's reporting misconduct of fellow officers was not subject to First Amendment protection because there is a professional duty to report misconduct. In *Dahlia v. Rodriguez* (2013) 735 F.3d 1060, a detective in the Burbank Police Department filed a complaint alleging that he was placed on (paid) administrative leave in retaliation for speech disclosing police misconduct in violation of the First Amendment, as well as in retaliation under state whistleblower protection law. The district court dismissed his case on the grounds that he did not have a right to sue because he spoke pursuant to his official duties and was thus not constitutionally protected, and that paid administrative leave is not an adverse employment action. A three-judge panel of the Ninth Circuit found that under the precedent of *Huppert v. City of Pittsburg* (9th Cir. 2009) 574 F.3d 696, the detective had reported the misconduct as part of his official duties and not as a First Amendment exercise and thus, was not entitled to First Amendment protections.

The Ninth Circuit then voted to rehear the matter so as to determine the propriety of Huppert, particularly in light of the United States Supreme Court's ruling in *Garcetti v. Ceballos,* 547 U.S. 410 (2006), which requires a practical inquiry into the job duties of an employee (not just the employer's job description) to determine whether or not the employee spoke pursuant to his or her duties.

With respect to the case at hand, the Court of Appeals concluded that, when the detective reported the misconduct up the chain of command to his lieutenant, that was part of his duties and he likely did not have First Amendment protection. However, when he reported the misconduct to Internal Affairs, to the Burbank Police Officers' Association president, and to the Los Angeles County Sheriff's Department, these

reports outside of his chain of command could also be outside his normal duties and, thus, potentially protected First Amendment activity. Accordingly, the detective's case should not have been dismissed by the district court, but rather, the specific facts and legal standards should have been considered at a full hearing.

The Court of Appeals further determined that, while paid administrative leave is not inherently an adverse employment action, if it prevented the detective from taking a promotional exam or receiving pay and opportunities for furthering his investigative experience as well as the general stigma resulting from being placed on administrative leave, this is "reasonably likely to deter employees from engaging in protected activity."

Accordingly, the Court of Appeals overturned *Huppert,* found that certain of the detective's reports might constitute protected First Amendment activity, and ruled that his administrative leave might constitute an adverse employment action. The Court then remanded the case to the district court for a full hearing and factual evaluation.

EMPLOYERS CANNOT DEMAND SPECIFIC MEDICAL INFORMATION IN SICK LEAVE NOTES

By Jennifer Stoughton

In the maze of leave laws, such as the Americans with Disability Act ("ADA") , the Family Medical Leave Act ("FMLA"), and their California counterparts, it is often difficult to sort out what information an employee must provide to their employer when requesting sick leave. This confusion is magnified when employers pressure employees to advise them of the particularities of their illness. Unfortunately, it is still the law in California that an employer can require an employee to submit a doctor's note even for a single sick day. However, the ADA has been interpreted to impose certain limitations on the type of information an employer can demand be included in a doctor's note. Specifically, the ADA prohibits employers from making inquiries into the disabilities of their employees unless (1) it is job-related and (2) necessary for the conduct of business. This means that an employer cannot demand that an employee provide specific medical information in a doctor's note for a routine sick day. Instead, the sick leave note need only say that the employee was out for a doctor-approved reason, or something to that effect. Additionally, the employer must keep all personal and medical information confidential and inaccessible to all other employees. One of the areas we find this to be a problem is sick leave lists containing reference to employees' specific medical conditions. Under the ADA, these lists are illegal, even if the list is posted in a supervisor's office.

CALIFORNIA EXTENDS THE DEFINITION OF "FAMILY MEMBER" UNDER THE PAID FAMILY LEAVE LAW

By Jennifer Stoughton

Recognizing the proliferation of multi-generation families, the Legislature enacted Senate Bill 770 to expand the definition of "family member" under California's Paid Family Leave law ("PFL"). PFL is a part of the State Disability Insurance ("SDI") system that provides up to six weeks of partial wage reimbursement to workers who must take time off work to care for a seriously ill family member or to bond with a new child. Currently, the PFL law defines family member as a seriously ill child, parent, spouse or registered partner. Senate Bill 770 broadens the definition of family member to allow workers to care for seriously ill siblings, grandparents, grandchildren, and parents-in-law. These changes go into effect July 1, 2014, and, like all other PFL benefits, will be entirely worker-funded.

NON-PUBLIC FACEBOOK POSTS CAN BE PROTECTED UNDER FEDERAL PRIVACY LAW, BUT FIRST AMENDMENT PROTECTIONS ARE GREATLY DIMINISHED WITH NON-PUBLIC POSTS

By Amber Griffiths

Federal appellate courts recently addressed the privacy rights as well as First Amendment rights of employees expressing opinions through social media such as Facebook. These decisions seem to indicate that public employees: (1) may be more protected under the First Amendment when posting about public matters on Facebook by opting out of privacy protections and allowing the public to see the post; but (2) also may be more protected from discipline under federal privacy law by selecting a Facebook privacy setting of "friends" only. Even then, privacy protections can be diminished or even destroyed, such as where a Facebook "friend" re-posts (or shows the post to the public employee's supervisor).

Ehling v. Monmouth-Ocean Hospital Service Corp. is one of the first cases to address whether social media communications are subject to the Stored Communications Act ("the SCA" or "the Act"), which is intended to make up for weak Fourth Amendment privacy protections available with respect to email and other internet communications. Deborah Ehling, a registered nurse and paramedic working at a hospital, posted a statement on Facebook that was critical of emergency response paramedics who had saved the life of a shooter at the Holocaust Museum in Washington, D.C. Ehling's coworker and Facebook "friend" of hers saw the post and showed it to Ehling's manager. There had been no request by the employer for the "friend" to do so. After Ehling was temporarily suspended with pay and warned that her post showed "deliberate disregard for patient safety," she filed a complaint with the National Labor Relations Board ("NLRB"), alleging unfair labor practice and privacy violations under the SCA. The NLRB denied Ehling's claims. Because hospital management had not itself accessed or solicited access to the Facebook post, there was no violation.

The Court of Appeals for the Fourth Circuit found that the posts were subject to the Act and emphasized that privacy settings used for any Facebook post in question was key. The SCA protects communications made via social media to the extent that privacy does, in fact, result from choosing a private setting. In this instance, the Fourth Circuit found little privacy had resulted, because Ehling's "friend" had voluntarily shown it to the employer.

The Fourth Circuit also recently considered whether a public employee's decision to "like" a political candidate's page is protected speech under the First Amendment. In *Bland v. Roberts,* six deputy sheriffs in Hampton, Virginia "liked" the page of the Sheriff's political opponent. All six were subsequently terminated from employment. The Court ruled in favor of the deputy sheriffs, analogizing their use of the "like" button to use of a political sign in one's front yard to display publicly support of a particular candidate.

The Court of Appeals reversed the District Court's finding that selecting "like" on Facebook is too insubstantial to merit free speech protections. The Court held that "liking" a Facebook page is protected by the First Amendment with respect to government employees because it results in publishing a substantive position on a topic. Doing so "literally causes to be published the statement that the user "likes" something, which is itself a substantive statement. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance."

The public nature of the Sheriffs' use of Facebook in *Bland* is a contrast to City of *Atlanta v. Gresham,* in which a police officer's decision to configure her Facebook post as viewable only by her friends made "her interest in making the speech … less significant (under the First Amendment) than if she had chosen a more public vehicle." Gresham, a police officer, had

complained on Facebook about interference by an investigator in her department. An individual Gresham arrested was the nephew of the investigator, who received some of her nephew's property when she spoke privately with him after he was arrested. After Gresham posted on her Facebook wall expressing concern about the investigator's actions, the department initiated an investigation of Gresham under its policy requiring criticism of a fellow officer to be "directed only through official department channels." Because of that investigation, she was passed over for a promotion. She filed suit alleging retaliation for her exercise of First Amendment rights.

Although the Eleventh Circuit agreed with the District Court's decision stating that "the ability of the citizenry to expose public corruption is one of the most important interests safeguarded by the First Amendment," the Court also affirmed the District Court's decision in favor of Gresham's employer because posting with a private setting on Facebook failed to satisfy the purpose of the *Pickering* test, which is to ensure crucial information reaches the public. Thus, posting under a private setting reduced the protection Gresham would have received had she posted publicly. Other factors weighing against Gresham were that the timing of her post, as well as the decision to post privately, both of which reflected that she did not intend to seek a resolution by posting on Facebook but to express frustration. Consequently, the Court concluded the City of Atlanta did not violate Gresham's First Amendment rights by restricting her speech.

SAN JOSE POLICE OFFICERS GET 10% PAY INCREASE

Carroll Burdick Partner **Gregg Adam** assisted the San Jose Police Officers' Association in negotiating a revised collective bargaining agreement. Note the use of the term "revised" here. In early summer of 2013, the POA had gone through interest arbitration under new rules promulgated by the San Jose voters in 2011. Those rules placed extraordinarily tight restrictions on the ability of the arbitrator to freely accept union proposals that create any type of monetary increase or could be perceived as creating unfunded liability. For example, pay increases were to be limited to the five-year average of various forms of city tax revenues (sales, property, telephone, etc.). Under the City's arguments, that average was actually negative 2%. In addition, under the new rules, the City was able to force the POA to use a retired judge at the cost of $6,000 per day to hear the parties' dispute.

Purportedly bound by the new rules, the judge ruled in favor of the City, gave officers zero increase, and even took away some pay premiums. However, as readers of this column and those who are following news from San Jose know, there has been a massive exodus of police officers from that City since Major Chuck Reed began his jihad on public employee pensions. Hundreds of officers have left the former magnet agency, and, as the POA predicted, this has put enormous pressures on San Jose's public safety model. Crime and public safety have become the number one issue in San Jose, despite Chuck Reed's efforts to try to continue to focus, both locally and now statewide, on so-called pension reform.

Against the backdrop of this growing public safety crisis and an extraordinarily effective media relations campaign by the POA, the City asked the POA to return to the bargaining table. With the assistance of mediator (and former head of California's State Mediation and Conciliation Service) Paul Roose, the parties agreed to increase police officers' salaries by 10% over nineteen months. The agreement will create a two and a half year contract, which in three installments by July 1, 2015, will return San Jose Police Officers to the salary levels they enjoyed in 2009. The POA had made a 5.25% concession in 2010, which increased to a 10% concession in 2011. These increases will restore officers' salaries to 2009 levels.

While the POA is happy with the deal, much remains to be done. The San Jose Police Department remains a department on the brink of catastrophe. The City

voters imposed a 2% at 60 second tier plan with no vested rights and next to no disability retirement rights. This has led to mass defections from new recruits and an inability to put together full compliments of academy classes. San Jose will be a case study going forward as to how NOT to try to address fiscal challenges on the backs of public safety.

THREE-YEAR MOU FOR HANFORD POLICE OFFICERS' ASSOCIATION

The Hanford POA successfully concluded bargaining over a new contract that expires in 2016. Sacramento Labor Partner **Gary Messing** was the chief negotiator, working with a team led by POA President Cory Matthews.

Compensation changes included matching contributions for deferred compensation of $75 per pay period retroactive to July 2013. Salaries are then boosted by 2% in the second year, and 2% in the third year of the MOU.

The fruits of bargaining included many other positive changes, including the creation of a catastrophic leave bank, a 5% differential implemented for the Gang Task Force/Narcotics Task Force, an increase from $600 to $1,000 per year for tuition reimbursement, and an increase to the uniform/clothing allowance from $950 per year to $1,200 per year.

Other fixes included establishing that bereavement leave is not deducted from sick leave, travel per diems are increased to IRS levels, CTO banks increase by 100 hours (from 100 to 200), and employees are entitled to cash out hours in excess of 100 hours once each year.

Among other increases was an additional 1% bump for lieutenants in July 2014. The City also agreed to conduct a joint salary survey with the POA, to be completed 120 days before the expiration of the MOU. The bargaining team and the POA were satisfied with the results of the bargaining, and look forward to improvements in the next round of negotiations in 2016.

THE SACRAMENTO COUNTY PROFESSIONAL ACCOUNTANTS ASSOCIATION RATIFIES NEW MOU

The Sacramento County Professional Accountants Association ("SCPAA"), led by their Chief Negotiator, Sacramento Labor Partner **Jason Jasmine,** with the valuable assistance of SCPAA President Jennifer Griffin and Vice President Diane Richards, negotiated a healthy new MOU that begins to make up for some of the ground lost during the Great Recession. Over the course of the three-and-a-half year contract, SCPAA-represented employees will receive cost of living adjustments of between 2-4% in June of 2014, and again in June of 2015. In June of 2016, they will receive a 4% COLA. Employees will also receive additional increases of 2% in June of 2014, 1.9% in June of 2015, and 1% in June of 2016 to compensate for increases that should have been received in prior years. These increases (between 12.9% and 16.9%) are offset by increases to retirement contributions that will total approximately 4.3% spread out over that same period.

Additional new benefits include a 2.5% differential for the possession of a CPA, CIA, or CISA certificate, and a 2.5% differential for the possession of certain Masters' degrees. Employees will also immediately receive 40 hours of Administrative Time Off that may be used anytime during the course of the MOU, but will be lost if not used by the expiration. SCPAA did agree to give up a parity clause it had in its contract, but in fact, it was that parity clause that caused the loss of scheduled COLAs in the prior contract. Finally, the County agreed to a mid-contract re-opener to discuss salary increases only. The new MOU also made a few relatively minor but still important language changes to protect the rights of its members.

After suffering through several tough years, this small group of accountants was happy to be able to obtain a strong contract for the next several years.

TUOLUMNE DSA SIGNS TWO-YEAR DEAL

The Tuolumne County Deputy Sheriff's Association (DSA) has entered into a two-year MOU with the County after contentious negotiations. The County attempted to move the negotiations toward impasse by its third meeting, serving the DSA with a last, best and final offer ("LBFO").

Although the initial LBFO contained draconian cuts, the DSA was able to negotiate much more favorable terms upon demonstrating the immense impacts on retention and recruitment that the current compensation package was causing. The Sheriff's Office had been running vacancies, particularly in patrol, that were also generating savings to the general fund. The Sheriff, Jim Mele, pressed the issue to the Board of Supervisors to allow the savings from the vacancies to be used to mitigate the pay cuts.

In the end, the two-year deal resulted in a small increase in salary and other changes that favorably impact overtime rates and retirement.

Under the two-year deal, the sworn and safety employees receive a 6.5% increase in year one, and an additional 0.5% increase in year two to offset a 6.25% contribution by employees of the employer contribution to PERS. The legacy/classic employees continue to have the County pick up their PERS contribution of 9%. In the second year of the MOU, non-sworn employees receive a 5% bump, to partially offset the 6.25% of their payment of the employer contribution.

Other provisions of the package include an agreement by the County not to attempt to remove non-sworn classifications from the bargaining unit during the term of the MOU. The DSA accepted proposals on limiting out-of-class compensation for corporals and overtime, based on hours actually worked (except for mandated or forced overtime), in return for very liberal shift-swap language. Sacramento Labor Partner **Gary Messing** was the chief negotiator, working closely with DSA President Dan Graziose and a very capable bargaining team.

THE LABOR BEAT

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