MESSING ADAM & JASMINE

THE LABOR BEAT

Index

FIGHTING THE GOOD FIGHT

AROUND THE STATE

ACROSS THE COUNTRY

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Fighting the Good Fight

MERCED COUNTY DSA GETS ONE-YEAR MOU EXTENSION

The Merced County Deputy Sheriff's Association (DSA) ratified extensions to its current memoranda of understanding (MOUs) that were set to expire at the end of June 2021. The one-year extensions include a 3% salary increase for both the sworn and non-sworn bargaining units represented by the DSA. The 3% salary increase will take effect in the beginning of April 2021. Dispatchers will receive an additional 5% increase, also effective in April. All other terms and conditions in the MOUs continue without modification. The MOU extensions were negotiated by DSA President **Roberto Torres** and chief negotiator **Gary Messing**.

THE CITY OF DAVIS SETTLES FLSA CASE FOR $1,268,912

Judge Kobayashi in the Federal District Court, Eastern District of California, has approved an FLSA settlement of a collective action between the City of Davis and certain of its nonexempt employees. *Robert Weist, at al. v. City of Davis*, Case No. 2:16-cv-01683-LEK. The case, filed by **Bobby Weist**, longstanding president of the City's firefighter union, IAFF Local 3494, settled for $943,912.04 in backpay and liquidated damages. The action, filed on behalf of the City's firefighters, was expanded to include all other eligible employees of the City. About half of the damages are to be paid to 31 firefighters who opted into the collective action at the outset. The other half of the damages will be paid to 222 other current and former employees of the City who will receive notice of the settlement of the action and the opportunity to join in the settlement. The City also agreed to pay attorney fees and costs in the amount of $325,000.

Weist was filed after the U.S. 9th Circuit Court of Appeal decided the case of *Flores v. City of San Gabriel* (9th Cir. 2016) 824 F.3d 890, regarding that city's failure to include cash in lieu (CIL) payments for health insurance in the regular rate of pay as required by the Fair Labor Standards Act (FLSA) for the calculation of overtime. After *Weist* was filed, the City of Davis attempted to pay all the damages it owed to all eligible City employees for its failure to include CIL in the overtime rate by paying approximately $320,000 in backpay and liquidated damages retroactively for three years. However, the City did not take into account the failure to pay the correct overtime rate for the cash out of compensatory time off. Additionally, the plaintiffs asserted that the IRS Section 125 cafeteria plan was not a bona fide plan pursuant to the FLSA due to the high percentage of CIL payments in relationship to the total amount of benefits paid out by the cafeteria plan in certain years.

Attorney fees amounted to $221,358.98, and costs were $103,641.02. The plaintiffs were represented by **Gary Messing** and **James W. Henderson, Jr.** of Messing Adam and Jasmine LLP. Plaintiffs' financial expert was Kirk Koenig of Berkeley Research Group.

MASSIVE AMOUNTS OF COMPULSORY OVERTIME CREATE UNSAFE WORKING CONDITIONS AT CAL FIRE

For the past several years, severely low staffing levels have caused the brave men and women of CAL FIRE across the state to work excessively long hours, making an inherently dangerous job even more perilous. Firefighters and other essential first responders report to their union, CAL FIRE Local 2881 (the "Union"), that being overworked is harming their physical and mental health. The problem has been made even worse due to the COVID-19 pandemic. Accordingly, the Union's president, **Tim Edwards**, has made this issue a top priority and has directed our firm, which serves as legal counsel for the Union, to file complaints with the State. **Gary M. Messing**, a partner and founding member of the firm, and **Matthew Taylor**, an associate, have filed on behalf of the Union workplace safety complaints at the California Division of Occupational Safety and Health ("Cal/OSHA") and reports of labor law violations at the California Labor Commissioner's Office. They will continue to handle the Union's legal efforts to force the State to do right by its dedicated firefighters and find a permanent solution to the problem.

CAL FIRE is a state agency that is primarily responsible for fire protection and stewardship of over 30 million acres of California's wildlands also known as State Responsibility Area ("SRA") lands. Its operations are divided into 21 units throughout the state, and its firefighters, fire engines, and aircraft respond to an average of more than 5,600 wildland fires each year, which burn more than 172,000 acres annually. In addition, CAL FIRE provides varied emergency services (e.g., municipal fire protection, emergency medical services, search and rescue response, hazardous materials mitigation, and natural disaster relief) in 36 of the state's 58 counties through contracts with local governments. In these areas, CAL FIRE employees staff county-wide fire departments and smaller departments on the municipal level.

The Union is the exclusive labor representative for ap-

proximately 7,000 active and retired employees of CAL FIRE, including firefighters, fire apparatus engineers, fire captains, battalion chiefs, foresters, pilots, supervisors, forestry logistics officers, fire prevention specialists, and other classifications.

CAL FIRE and its contracting partners, on the county and municipal levels, have failed to solve the staffing crisis permanently, which requires hiring more personnel. Instead, they have engaged in mere triage by ordering existing employees to work excessive amounts of overtime to respond to emergencies. For example, from 2016 to 2019, CAL FIRE employees in its largest unit—the Riverside Ranger Unit ("RRU") which consists of more than 1,000 firefighters—were forced to work on average the equivalent of more than 3,600 days of overtime per year to cover staff shortages. As another example, from 2017 to 2020, CAL FIRE employees in the San Luis Obispo Unit, which consists of approximately 330 firefighters, were forced to work on average the equivalent of approximately 3,087 days of overtime per year to cover shortages. The overtime hours fall into two categories: "forced" (or mandatory) overtime and "voluntary" overtime. Forced overtime means that CAL FIRE management is forcing employees to work overtime hours at certain times, while voluntary overtime means that management is offering employees the choice of when to work overtime shifts that must be filled. But this distinction belies the fact that most, if not all, of these overtime shifts are compulsory. Because the department's emergency response positions cannot go unfilled, if an employee does not volunteer for a specific, so-called voluntary overtime shift, management will ultimately either force that employee or another employee to work it.

Due to the effects of COVID-19 in 2020 (which continue in the present) the existing staff shortages have reached a crisis level. Since the start of the pandemic, a significant number of CAL FIRE firefighters took sick leave because they suffered from COVID-19 symptoms, tested positive for the virus, or were quarantined due to a possible exposure. In many cases, the same employee took multiple sick leaves due to repeated on-duty exposure (or potential exposure). Also, in certain CAL FIRE units employees have been reassigned from fire protection duty to COVID-19 incident management to respond to the pandemic's effect on the unit, thus further depleting firefighting ranks.

The effect of these repetitive sick leaves and employee reassignments has placed severe strain on the already taxed workforce. The amount of overtime days in 2020 sky-rocketed from amounts in prior years. Employees in the RRU worked a staggering 5,355 days of overtime throughout the year. This figure dwarfs the 2018 figure of 2,544 days and the yearly average from 2016 through 2019, which was a little more than 3,600 days.

For an individual employee, this means he or she worked an excessive amount of days with few or no days off. It was not uncommon in 2020 for a CAL FIRE employee to **work 24-hour shifts for 17 or more consecutive days without any time off** due to overtime. In the most egregious cases, employees **worked 30 consecutive days of 24-hour shifts without time off**. It is important to keep in mind that the employees working these overtime shifts day-after-day are performing critically important and dangerous assignments, ranging from working the fire lines at large wildland fires to responding to numerous emergency calls within metropolitan areas. In the latter case, certain CAL FIRE stations experience a very high volume of emergency calls—approximately 12 to 15 per day—requiring personnel to respond throughout the day and at all hours of the night. Accordingly, firefighters who are forced to work overtime on the front lines of large fires or at busy stations are placed under great stress, which may adversely affect their health.

Before understaffing became a severe problem, CAL FIRE firefighters typically worked large amounts of overtime primarily during "fire season," the hottest time of the year when fires were not only more frequent, but also larger and more dangerous. The fire season is approximately from April to October in northern California and a little later (from May to November) in southern California. Historically, fire season requires "all hands on deck" and CAL FIRE employees work significant amounts of overtime to respond to the greater emergencies. In the cooler "off season," there is less demand for fire protection, and CAL FIRE employees worked less, taking more time off. This meant time for employees to physically and emotionally recuperate from the grueling schedule of the fire season and the opportunity to make up lost time with families.

Due to the staffing crisis and COVID-19, excessive overtime is no longer confined to fire season, but endures throughout the year. Now, the extreme stress that comes from working long hours for many days on end has become permanent. This means that the vital down time that once occurred during the relatively slower part of the year, which helped sustain employees during the fire season onslaught, is no longer available.

Under these conditions, employees are unable to "turn off" either physically or mentally to recuperate from the extended work periods. This causes firefighters to suffer from severe fatigue, which decreases their capacity for

heightened awareness during emergency incidents. As a result, occupational accidents are more likely to occur, which in turn increases the likelihood that firefighters will get injured on-duty. To put this in the proper perspective, in normal times without a global pandemic, CAL FIRE employees generally work a consecutive 72-hour period without a day off. This is far more than almost all other firefighters in the state—who typically work a 56-hour work week. Even without overtime these extended shifts subject firefighters to a dangerous and stressful work environment. CAL FIRE's longer 72-hour shift, extended by overtime days, has an enormous negative impact on the health of firefighters.

Working long hours for days on end has wreaked havoc on CAL FIRE employees. Overworked beyond the point of exhaustion, employees report physical fatigue and mental distress. Some blame excessive overtime for causing their marriages to fail, while others are quitting CAL FIRE to be free of the stress. Even worse, some employees' emotional distress is so severe that they have had suicidal ideation.

In response to the Union's complaints, representatives from Cal/OSHA and the Labor Commissioner's Office have informed us that neither agency (nor any other state agency for that matter) is expressly authorized by statute or regulation to handle workplace safety issues caused by employees working excessive overtime shifts. Nevertheless, neither agency has yet to decline jurisdiction of the matter. We will keep you informed about this important issue as it moves forward through the administrative processes and any other legal process that may be necessary to seek a permanent solution.

Around the State

CONVICTION FOR DOMESTIC VIOLENCE AGAINST A NON-SPOUSE MAY TRIGGER FEDERAL FIREARMS RESTRICTION

Any firearms restriction will sideline a peace officer, but a federal firearms restriction is likely career-ending because there is currently no appeal process to get the restriction lifted. Federal law prohibits "any person convicted of a misdemeanor crime of domestic violence" from possessing a firearm. (18 U.S.C. § 922(g)(9).) And the exception for carrying a gun issued by a government agency—covering law enforcement officers, military service members, and the like—does not apply. This means that law enforcement officers whose job duties require them to carry a firearm, but who cannot because of a domestic violence conviction, may be terminated for not meeting the minimum qualifications of the position.

In a recent decision, *Hernandez v. State Personnel Board* (2021) 60 Cal.App.5th 873, the Fourth District Court of Appeal ruled that the term "domestic violence" in the federal law includes relationships between unmarried persons, even when they do not live together. Hernandez was a state correctional officer arrested for choking his girlfriend. He pled no contest to a misdemeanor violation of Penal Code section 273.5, infliction of bodily injury on a spouse, cohabitant, or another intimate partner who has had "an engagement or dating relationship." The California Department of Corrections and Rehabilitation terminated his employment because he no longer met the minimum qualification of being able to carry a firearm at work based on the federal firearms prohibition. The State Personnel Board upheld his termination. Hernandez then appealed to the courts, claiming that he and his girlfriend did not meet the definition of a "domestic relationship" for the federal prohibition to apply.

While the Penal Code contemplates a casual "dating relationship" to apply to the crime of domestic violence, the federal definition of a "domestic relationship" begins with: (a) a current or former spouse; or (b) a person who is cohabitating or has cohabitated with the victim. Neither of these categories applied to Hernandez's case. However, there is a third category: (c) "a person similarly situated to a spouse … of the victim." The Court of Appeal analyzed federal court decisions and found that a relationship "similarly situated to a spouse" does not require a long relationship, shared finances, or an intent to marry. The court concluded that the federal definition simply requires a "sexual relationship that involves regularly spending the night together." The court speculated that there may be cases where the relationship is too brief to qualify, such as a "single-night tryst," but that was not the situation for Hernandez and his girlfriend. For these reasons, the court affirmed the State Personnel Board's decision upholding Hernandez's termination.

At MAJ, **Lina Balciunas Cockrell** specializes in restoring law enforcement officers' firearms rights. Please contact us immediately if you have been served with a restraining order, arrested for domestic violence, or involuntarily committed for mental health treatment so we can help you save your job.

CALIFORNIA MAKES ABC TEST FOR INDEPENDENT CONTRACTOR CLASSIFICATION RETROACTIVE

By Wendi Berkowitz

The question of who is an employee and who is an independent contractor has been at the top of many people's

minds for a few years now. In 2018, the California Supreme Court issued a monumental ruling in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, creating the so-called "ABC" test for distinguishing between employees and independent contractors. Under the ABC test, an employer may classify a worker as an independent contractor **only if** the employer can establish **all** of the following: (A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, based on the contract and in actuality; (B) the worker performs work that is outside the usual course of the hiring entity's business; and (C) the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed. Then, in 2019 the California Legislature adopted A.B. 5, placing the *Dynamex* ruling and its ABC test into statute. A strong motivation for the Legislature came from the expansion of the gig economy, in which many companies have hired armies of workers as "independent contractors," thus avoiding the minimum wage, overtime, paid sick leave, unemployment benefits, workers' compensation, and other employer obligations to California employees.

Shortly after the adoption of A.B. 5, companies and professional associations lobbied the Legislature to carve them out of the ABC test. In 2020, the Legislature adopted A.B. 2257, which modified and added exemptions for certain employment areas from the A.B. 5 rules. This affected workers in dozens of industries, including doctors, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, private investigators, accountants, certain insurance and investment professionals, direct salespeople, hairdressers, manicurists, and estheticians. (And in November 2020, the gig economy struck back at the Legislature when voters approved Proposition 22, which exempted workers for "app-based transportation and delivery" companies from the A.B. 5 rules.)

For industries where workers are not subject to A.B. 5 (or the Proposition 22 rules), the so-called "*Borello*" test applies. In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, the California Supreme Court created a multi-factor test. Under this holistic test, courts must consider "the totality of the circumstances," and no single factor is determinative in classifying a worker as an employee versus an independent contractor. A court applying the *Borello* test will weigh all the factors and circumstances to determine to what extent the hiring entity controls how the worker performs the work they were hired to do.

When the Legislature adopted A.B. 5, it did not say whether or not the ABC test should be applied retroactively. The *Dynamex* Court ruling did not answer this either. Businesses have been examining their workforces to reclassify workers (if appropriate) and treat them as either employees or independent contractors. But the consequences of being wrong can be potentially ruinous to a business, especially if the ABC test applies retroactively and an employer is on the hook for backpay damages.

Enter *Vasquez v. Jan-Pro Franchising International, Inc.*, a lawsuit brought by workers seeking a class action against a company for misclassifying them as independent contractors, and seeking backpay damages for minimum wage and overtime claims. The case was originally filed in 2008 in the U.S. District Court of Massachusetts, but some California law claims were pulled out of the case and relocated to the U.S. Northern District Court of California. The Northern District Court granted the employer's motion for summary judgment on all the workers' California law claims, and the workers appealed to the U.S. Ninth Circuit Court of Appeals.

At first, the Ninth Circuit overturned the District Court's summary judgment and found that the *Dynamex* ruling and its ABC test applied retroactively. But when the company petitioned for rehearing, the Ninth Circuit formally asked the California Supreme Court to answer the question whether, under California law, the *Dynamex* ruling should be applied retroactively. The California Supreme Court answered "yes," in *Vazquez v. Jan-Pro Franchising International, Inc.* (Jan. 14, 2021) 10 Cal.5th 944. Armed with this answer, on February 2, 2021, the Ninth Circuit affirmed its prior ruling and found that applying the *Dynamex* ruling retroactively did not violate the company's constitutional due process rights. The Ninth Circuit remanded the case back to the District Court to receive additional evidence and apply the ABC test to determine if the workers were misclassified. *(Vasquez v. Jan-Pro Franchising International, Inc.* (9th Cir. 2021) 986 F.3d 1106.)

The takeaway from this latest dramatic turn of events is that many companies who hoped to avoid legal liability by convincing courts to apply the more lenient *Borello* test will instead be forced to prove their workers qualify as independent contractors under the ABC test. Several similar lawsuits were pending when the *Dynamex* decision was issued and many are still working their way through the courts. These recent decisions by the California Supreme Court and the Ninth Circuit will ensure that any worker with "live" legal claims under the ABC test receives the full benefit of the *Dynamex* decision.

COURT OF APPEAL RULES AGAINST PURGING OF EMPLOYEE PERSONNEL FILES

By Steve Kaiser

Labor agreements often contain a "file purge" clause that requires employee personnel records to be purged of any discipline, or documentation that might lead to discipline (such as counseling memoranda and written warnings), after a period of time. Employee organizations consider this an important tool to protect employees from unjust discipline, since the time limit prevents the employer from relying on old, stale discipline and informal correction in an employee's file. The time limit varies based on the labor agreement, because employers typically bargain for longer time periods and employee organizations bargain for shorter ones. Periods between one and three years are the most common. Nonetheless, California's Fifth District Court of Appeal recently held that a one-year file purge clause in a labor agreement covering state employees is unenforceable because it violates public policy.

The case got to the appellate court in an unusual way. It started when the California Department of Water Resources provided an employee with a notice of discipline (known as a Notice of Adverse Action). Although the employee had regularly reviewed his personnel file and requested that all documents containing negative information more than one year old be purged from his file, the notice expressly relied on documents that should have been purged. The employee appealed the discipline to the State Personnel Board ("SPB"). But the employee and the Department settled the case before any formal hearing, agreeing to a lesser form of discipline.

Next, the International Union of Operating Engineers—the union representing the disciplined employee and all other employees in State Bargaining Unit 12—filed a grievance against the Department. The grievance alleged the Department violated the Memorandum of Understanding between the Union and the State by basing its disciplinary decision on documents that should have been purged from the employee's personnel file. The Memorandum of Understanding ("MOU") contained a file purge clause that expressly allowed an employee to request that documents older than one year that contain negative information be removed from the employee's personnel records. The Department and the State denied the grievance, so the Union took the grievance to arbitration. At the hearing, the arbitrator ruled in the Union's favor and ordered the State to cease and desist from relying on purged documents when making disciplinary decisions.

The case then moved into the courts. The State asked the Kern County Superior Court to vacate the arbitrator's decision on the basis that it violated public policy. But the Superior Court ruled against the State and upheld the arbitration decision. The State appealed.

In *Department of Human Resources v. International Union of Operating Engineers* (December 17, 2020), the Fifth District Court of Appeal overturned the Superior Court's decision, and thereby the arbitrator's decision. The appellate court found that the arbitrator's decision was contrary to public policy because it violated the so-called "merit principle" that applies to state employees. In its analysis, the court noted several prior court cases held that the merit principle arose from the California Constitution. Article 7, Section 1(b) of the California Constitution requires state civil service employees to be hired, appointed, and promoted on the basis of a merit system. This merit system gives the SPB exclusive jurisdiction over state employee discipline appeals. And the SPB has adopted the principle of "progressive discipline," which requires state departments to prove they took progressively more severe actions before formally disciplining an employee.

Here, the appellate court found that the file purge clause in the MOU would have prevented the Department from applying progressive discipline and proving to the SPB that it did so. Without any historical disciplinary or informal corrective documents more than a year old, it would be difficult for the Department to show it took progressively more severe steps to correct an employee's workplace performance and behavior. As the court put it, this would have "impeded the ability of state departments to make reasonable and sound employment decisions based on merit." The court found that this violated public policy because it would "hamper the ability of state department to bring appropriate disciplinary actions."

On the verge of holding that file purge clauses are forbidden by the merit principle under any circumstances, the appellate court made two caveats. First, it stated that progressive discipline does not have the same constitutional stature as the merit principle, but in this case it was so intertwined that it required the court's conclusion. Second, the court stated that its holding applied only to the one-year file purge clause in the current MOU, not necessarily to the previous version in prior MOUs, which instead had a three-year time limit. The court speculated that the parties previously used the three-year limit to be consistent with the three-year deadline for a state department to bring disciplinary ac-

tion against an employee. In that case, it might comply with the state's merit principle.

Many public sector labor agreements contain provisions on discipline and employee personnel records, and these are often sticking points in negotiations. This court decision takes one thing off the table for state employee unions: one-year file purge clauses. The decision may also impact local agencies that have adopted civil service commissions and merit principles, particularly charter counties and cities. Additionally, the court hinted that a three-year file purge clause may be enforceable for even state employees. So, as they say, there is still room to negotiate.

CALIFORNIA LEGISLATURE TIGHTENS BAN ON NO-REHIRE PROVISIONS IN SETTLEMENT AGREEMENTS

By Wendi Berkowitz and David Kruckenberg

In 2019, in response to the #MeToo movement, the Legislature adopted A.B. 749, which added Section 1002.5 to the Code of Civil Procedure. This new law prohibits settlement agreements between an employer and an employee from including a restriction on the employee seeking future employment with the employer or its related entities or contractors. Existing law already prohibited an employer from retaliating against an employee who complained about unlawful discrimination or harassment by terminating the employee. But, according to the Legislature, employers sometimes got around this by entering into settlement agreements with employees, essentially paying them to voluntarily leave their employment and never come back. Concerned that this loophole discouraged the remaining employees from raising complaints of unlawful workplace behavior, the Legislature made these no-rehire provisions unenforceable.

However, in consideration of those unique circumstances where a complaining employee is also the subject of someone else's complaint, A.B. 749 included an exception. Under this exception, a settlement agreement could include a no-rehire provision only if the employer made a good faith determination that the employee engaged in sexual harassment or sexual assault. This exception was meant to ensure the prohibition did not unintentionally protect bad actors.

In 2020, the Legislature revisited this issue and adopted A.B. 2143. First, this bill requires that the complaining employee's complaint be made in good faith. The prior version of the law theoretically allowed a bad actor to seek legal protection by making a baseless complaint about the workplace. A.B. 2143 prevents this by requiring the employee to have a good faith reason for making the complaint.

Second, the bill amends the exception by broadly expanding the range of bad actors not protected by the prohibition. A settlement agreement may now include a no-rehire provision if the employee was found to have engaged in sexual harassment, sexual assault, or "any criminal conduct." The term "criminal conduct" is not defined, and so may include any felony, misdemeanor, or infraction.

Third, the bill narrows the conditions for when the exception applies. Now, for a no-rehire provision to be permissible, the employer must have made a good faith determination the employee engaged in one of the listed behaviors **before** the employee raised their complaint. And the employer's determination must have been documented. The prior version of the law theoretically allowed an employer to determine that a complaining employee was a bad actor without conducting a proper investigation and documenting its actions. The clarifications in A.B. 2143 reinforce the employer's legal obligation to conduct fair, impartial, and thorough investigations into complaints about unlawful discrimination and harassment.

It is important for both employers and employees to be familiar with these legal requirements, since it has been common practice for years to include a no-rehire provision in a termination or pre-termination settlement agreement. These new requirements should prompt employers to be more vigilant in investigating workplace complaints and generating written reports of investigations. Correspondingly, employees and their union representatives should be vigilant about monitoring these investigations, as they often signal how seriously an employer views complaints. And the thoroughness of the investigation may affect whether the employer can insist on including a no-rehire provision in a pre-termination settlement agreement. Ultimately, however, the employer carries the greater risk because failing to meet these legal requirements only makes the no-rehire provision unenforceable. The employee could get the benefit of both the settlement agreement and the opportunity to re-apply for work with the employer, its subsidiaries, or its contractors.

PERB AWARDS ATTORNEY FEES FOR EMPLOYER'S REFUSAL TO ARBITRATE

By Laurie Burgess

Unions and their lawyers frequently lament the Public Employment Relations Board's ("PERB") reluctance to

award remedies that truly make the union and its members "whole." (Readers should note that since 2015, PERB has exercised jurisdiction over law enforcement employee organizations, including those made up entirely of peace officers.) One remedy—the award of attorney fees to a successful charging party—has long been available but PERB has infrequently used it. This is partly due to the presumption under the so-called "American rule," where each party is required to pay its own attorney fees and costs unless a federal or state statute mandates the award of fees to the prevailing party. Thus, while PERB has the discretion to grant such a remedy, it has rarely used this authority.

PERB's recent decision in *Sacramento City Teachers Association v. Sacramento City Unified School District* (2020) PERB Decision No. 2749, provides valuable insight into when PERB may be willing to grant attorney fees as a remedy. In this case, the employer refused to arbitrate a dispute with the union involving an arguably ambiguous contract provision about the salary schedule. The union filed a PERB charge over the failure to arbitrate. Shortly thereafter, the employer filed a lawsuit in Superior Court seeking a declaratory judgment that the salary agreement was not valid and that it therefore had no obligation to arbitrate the matter. The union filed a countersuit requesting the Court to compel the employer to arbitrate the matter. Since all matters involving contract disputes—including grievability—were subject to the arbitration procedure, the Court held that the matter must be arbitrated.

After a hearing on the dispute, the arbitrator ruled in the union's favor on the merits, and PERB issued a complaint regarding the employer's initial refusal to arbitrate the case. The PERB Administrative Law Judge ("ALJ") found that the employer's refusal to arbitrate constituted an unlawful unilateral change in the negotiated arbitration procedure. And, as part of its "make whole" remedy, the ALJ ordered the employer to reimburse the union for the legal fees it incurred to obtain a Court order directing the employer to arbitrate the matter.

On appeal, PERB affirmed the ALJ's proposed decision. It ruled that failing to process a grievance in accordance with the contract may be an unlawful unilateral change or a repudiation of the contract. PERB also affirmed the ALJ's decision to award repayment of the union's attorney fees. It ruled that when a party incurs fees due to participating in an "ancillary proceeding" (such as litigation in the Superior Court), attorney fees is an appropriate remedy for the impacts of the other party's unfair labor practice. The employer insisted that attorney fees can only be awarded where a party engages in "sanctionable misconduct" such as pursuing a frivolous motion in bad faith. However, as PERB noted in its decision, it has authority to award attorney fees under its broad authority to make a party "whole" for the wrong the other party has done.

An award of attorney fees may remain an uncommon remedy. But this case provides a good stepping stone for seeking fees in cases where the union must incur extraordinary expenses to vindicate rights under the collective bargaining statutes that PERB enforces. Employers' attorneys certainly took note of this decision, because it reinforces that an employer may be liable for the union's attorney fees in unfair labor practice cases.

Across the Country

JANUS DECISION DOES NOT REQUIRE UNIONS TO REFUND DUES

By Monique Alonso

You will likely recall that in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018), the U.S. Supreme Court ruled that the collection of agency fair share fees from public sector employees who are not union members is unconstitutional under the First Amendment. Since the ruling in *Janus*, anti-union groups have mounted a nationwide effort to expand the holding beyond non-union employees. One line of attack was to seek court rulings that unions must repay non-union members the fair share fees they paid going back several years, which would have bankrupted many unions. Courts have uniformly rejected this argument, including most recently when the Supreme Court declined to consider Mr. Janus's appeal after the U.S. Seventh Circuit Court of Appeals ruled against him. (*Janus v. A.F.S.C.M.E., Council 31*, No. 19-1104 (U.S. Sup. Ct., Jan. 5, 2021).)

Another line of attack has been to argue that based on the *Janus* ruling, unions violated the free speech and free association rights of their members by charging them dues (despite employees affirmatively choosing to become union members). Specifically, these lawsuits argue that when unions decline to either cancel employees' membership on request, or continue to collect dues until the termination of the membership agreement (typically the expiration of the labor agreement), the unions violate employees' First Amendment rights.

Under the *Janus* ruling, public employees have a First Amendment right not to join a union or pay fees to the union unless they affirmatively consent. This aspect of

consent has led courts across the country to distinguish the *Janus* ruling from cases where an employee chose union membership. These courts have consistently found that employees may waive their First Amendment rights. They have also found that unions may enforce employees' contractual obligations to pay dues through the duration of the contract and to withdraw from union membership only under the conditions of the contract. Also, courts have uniformly rejected employees' arguments that private entities such as unions may be sued for violation of constitutional rights under 42 U.S.C. section 1983, concluding that there is no "state action" involved in the unions' collection of dues from voluntary members. Finally, courts have ruled that despite the *Janus* ruling, unions do not have an obligation to obtain a separate and distinct "waiver" of constitutional rights from employees when offering membership.

Continuing a nationwide trend in these post-*Janus* union dues cases, the U.S. Ninth Circuit Court of Appeals recently ruled in favor of unions in a closely-watched case coming out of the State of Washington. In *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), state employees authorized the state to deduct union dues from their wages, and agreed that their authorizations would be irrevocable for a period of one year. After the *Janus* decision, these employees sought early withdrawal from union membership. The union released them from membership but continued to collect dues. The employees then sued, alleging that the collection of dues for the remainder of their one-year authorizations violated their First Amendment rights and unjustly enriched the union.

The Ninth Circuit dismissed the case, finding that "the world did not change for *Belgau* and others who affirmatively signed up to be union members[, because] *Janus* repudiated agency fees imposed on nonmembers, not union dues collected from members, and left intact 'labor-relations systems exactly as they are.'" In *Belgau*, the dues authorization card in question clearly stated that union membership was voluntary and that the authorization was irrevocable for one year. The Ninth Circuit found that there was no "state action" in the union's enforcement of private dues agreements and rejected the constitutional challenge. Further, the Ninth Circuit found no compulsion to join and pay dues, noting: "We join the swelling chorus of courts recognizing that *Janus* does not extend a First Amendment right to avoid paying union dues."

In *Belgau*, the Ninth Circuit set a precedent for all District Courts in the Circuit, including in California. It therefore applies to all California public sector unions' relationships with their members. However, in February 2021, the plaintiffs in *Belgau* petitioned the U.S. Supreme Court to take up the case, signaling the endgame for the anti-union groups' efforts over the past two and a half years. Whether the Supreme Court takes up *Belgau*, or a similar case out of another circuit, the ultimate issue will likely go before the high court soon. Until then, *Belgau* and cases following its lead control this issue in the Ninth Circuit. We continue to closely watch these cases, as unions battle for survival against lawsuits instigated by mostly out-of-state anti-union groups.

WILL A FEDERAL APPEALS COURT DECISION UPHOLDING A POLICE OFFICER'S FIRST AMENDMENT RIGHT TO POST ABOUT THE JOB ON SOCIAL MEDIA SERVE AS LASTING PRECEDENT?

By Gregg Adam and Matthew Taylor

In recent years, it is hard to recall many published court opinions that have protected police officer's—or for that matter any public employee's—right to post social or political commentary on social media. Almost every decision it seemed upheld the right of public agencies to discipline their employees for posted speech that the agency deemed harmful to the larger interests of the agency.

It was, therefore, something of a breath of fresh air, when, in a January 12, 2021 decision called *Moser v. Las Vegas Metro Police Department,* No. 19-16511 (9th Cir., Jan. 12, 2021), the Ninth Circuit Court of Appeals upheld the First Amendment right of a police officer to post his own commentary about the job on social media while off-duty. Though this ruling represents a win for public employees against governmental employers' encroachment on employees' free speech, it is too early to tell whether it will significantly alter the landscape of First Amendment protections in public sector employment. It simply leaves open too many unanswered questions about its precedential effect and how it can be applied to different sets of facts.

The facts underlying the case began in 2015 when an assailant shot a Las Vegas Metro police officer. A few days later, the suspect was apprehended. The plaintiff in the case, Charles Moser, a sniper on Metro's SWAT team and a former Navy SEAL, was present at neither the shooting nor the suspect's arrest. Learning about the arrest after the fact, he made the following comment in a Facebook post while off-duty: "Thanks to a Former Action Guy (FAG) and his team we caught [the assailant] … It's a shame he didn't have a few holes in him …" *Sabatini v. Las Vegas Metro Police Department* (D. Nev. 2019) 369 F. Supp. 3d 1066 (the name of the trial court case refers to Moser's co-plaintiff, John Sabatini, who did not appeal

the decision of the trial court). Next to Moser's name above the post was his profile picture, which at the time was a cartoon of an angry-looking soldier with a helmet and rifle and the word "sniper" written across his chest. Id. Moser later explained that the term "Former Action Guy" was a nickname that his friend had given himself after he voluntarily transferred from the SWAT team to his current unit. *Id*.

An anonymous complaint was filed about the post, which prompted an Internal Affairs investigation. During his Internal Affairs interview, Moser stated that he had been upset about the shooting and realized after the fact that his post was "completely inappropriate" and that he "shouldn't have ever said that." *Id*. He further explained that he intended to express his frustration that the suspect had "basically ambushed one of our officers" and that "the officer didn't have a chance to defend himself." *Moser, supra*, No. 19-16511 at 7. He also said that he had removed that comment by the time of this interview. *Id*. The investigator found that, "[t]hough Officer Moser was expressing himself as a private citizen, [his Facebook post] would negatively impact or tend to negatively impact the department's ability to serve the public and would impede the performance of Officer Moser's duties as a sniper in SWAT." *Id*. Concluding that Moser's Facebook comment showed he had become "a little callous to killing," members of the Department's command staff imposed discipline by transferring Moser out of SWAT back to patrol. *Id*.

His administrative grievances being denied, Moser sued in federal district court arguing that his disciplinary transfer was an unconstitutional retaliation for his protected speech. Both parties moved for summary judgment. In other words, both sides requested that the court issue a decision without holding a trial to determine the facts. Typically, the motion must show that no genuine issue of material fact exists, and that the opposing party loses on the claim as a matter of law even if all its allegations are accepted as true.

The trial court denied Moser's motion and granted the department's motion ruling that Moser's discipline was justified under the *Pickering* balancing test used by courts to assess First Amendment rights for governmental employees. Under this test, which is named after the U.S. Supreme Court decision that first applied the test, *Pickering v. Board of Education* (1968) 391 U.S. 563, a court must first determine whether the employee showed that (1) he spoke on a matter of public concern; (2) he spoke as a private citizen rather than a public employee; and (3) he suffered an adverse employment action as a result of the speech. If the employee overcomes these hurdles, then the employer must demonstrate that its interest in preventing disruption in the work place from the speech outweighs the employee's First Amendment right to free speech.

Moser appealed this decision to the Ninth Circuit. As in most appeals, only a subset of the full Ninth Circuit comprising three judges, reviewed the lower court's ruling. In a split decision of 2 to 1, the Ninth Circuit reversed the trial court based on the following findings. There were no factual disputes over the three *Pickering* factors stated above. The parties agreed that the Facebook post touched on a matter of public concern, Moser spoke as a private citizen, and he was disciplined because of his speech. Yet, the trial court left unresolved two factual disputes, which precluded it from assessing whether the government employer's interest outweighed the employee's First Amendment rights. The first concerned the objective meaning of Moser's speech in the Facebook post. Was it, as Moser contended, "a hyperbolic political statement lamenting police officers being struck down in the line of duty," or as interpreted by Las Vegas Metro "a call for unlawful violence against suspects?" According to the Ninth Circuit, the trial court's findings failed to adequately address this question leaving the meaning of Moser's comment ambiguous.

The second unresolved factual issue was whether Moser's comment would have likely caused disruption in the police department. The Ninth Circuit found that there was insufficient evidence showing the likelihood of such disruption. There was no media coverage of the comment, nor any evidence that anyone besides the anonymous tipster was aware of it. It was unlikely that the public would have even known that Moser was a sniper on the SWAT team since his Facebook profile did not discuss his employment. Also, there was only a small chance that the public would have seen the Facebook comment altogether since Moser deleted it within months of its posting. Furthermore, Las Vegas Metro provided no evidence to support its claim that the comment would expose it to future legal liability. In its court filings, the department speculated that if Moser were to shoot someone in the future, a lawsuit would result, and his comment would likely sway a jury to hold the department liable. However, as the Ninth Circuit pointed out, this speculation was unsupported by any legal authority. Las Vegas Metro "cited no case in which such a long chain of speculative inferences tipped the *Pickering* balancing test in the government's favor."

Because of this ambiguity, the Ninth Circuit remanded the case to the trial court, which will lead to further anal-

ysis from that court and likely more fact-finding through a full trial.

Now that the Ninth Circuit's decision is the law in California, it would be prudent for state and local governmental employers facing a similar issue to make sure that they can meet the higher burden set by the Ninth Circuit, i.e., produce sufficient evidence that shows an employee's speech has or will disrupt the workplace. Yet, for the reasons discussed below, the Ninth Circuit's decision here may not ultimately provide greater protections for employees' speech than the erstwhile *status quo*.

First, Las Vegas Metro may request a rehearing of the case by a larger panel of judges at the Ninth Circuit. The full panel could overrule the three-judge panel that decided the case if they were to arrive at similar conclusions as the dissenting judge on the three-judge panel, Judge Berzon. She stated that Moser waived any argument about the meaning of his Facebook comment because, as he asserted in his motion, his Facebook comment was meant to express his regret that "the Officer who was shot did not get off any defensive shots in connection with his being ambushed." Based on this, Judge Berzon stated that Moser's post was not "objectively ambiguous" as determined by the majority's opinion. She further concluded that "[v]iewing Moser's statement as reasonably understood to sanction the use of unnecessary force, Metro had good reason to conclude that harboring and communicating that view was a serious impediment to performance of the duties of a SWAT officer." As such, per applicable judicial precedent regarding First Amendment issues in the public sector workplace, courts must give "substantial weight" to an employer's "reasonable predictions" of disruption as a result of an employee's speech.

Second, the facts of Moser's case are relatively unique and thus may not be applicable to other fact patterns. In the past several years, there have been many instances where police officers' texts, social media posts, or other communications have been made public, and as a result have drawn significant negative attention. Thus, in other fact patterns, unlike those in Moser's case, it may be relatively easy for police departments to provide a record that shows past disruption in the workplace or even the potential for future disruption. Accordingly, the evidentiary bar set by the Ninth Circuit in this case may prove to be quite low.

Third, even if this ruling stands, it is unlikely to deter police departments from disciplining officers over controversial statements given the current political climate. As Judge Berzon stated, "I do not for a minute doubt that protecting the First Amendment right of public employees to contribute to the public dialogue on issues of public importance is of critical importance… But we are living in a time when, driven by public concern, police departments nationwide are engaged in self-examination concerning how best to curb the use of excessive force by police officers as they carry out law enforcement's critical role." Thus, while the *Moser* decision may give employees a higher chance of success in overturning their discipline if and when they finally fight their employer in court, this may bring little comfort for most who want to avoid disciplinary charges and the administrative grievance process.

The take-away from this decision is that although the Ninth Circuit put a brake on what it determined to be an employer's "swift justice" over a "careless comment," it is not clear what the road ahead will be for other officers whose public comments are found to be offensive by their departments or members of the public. The best course of action for PORAC members should therefore be to continue to avoid public commentary about their jobs, especially use of force situations.

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