CAJPA 2024

CASELAW UPDATE

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JPA ADMINISTRATION AND COVERAGE CASES

By: Douglas Alliston, Alliston Law Office

Truck Ins. Exch. v. Kaiser Cement & Gypsum Corp. (June 17, 2024) _ Cal.5th _

Summary: In multi-year property damage losses, standard first-level excess policies apply when their underlying policies are exhausted, without regard to whether primary policies in other years are exhausted ("vertical exhaustion"), which may allow contribution claims between primary and excess insurers covering the same multi-year loss.

Discussion: Over the last several decades, the California Supreme Court has addressed different aspects of the application of successive liability policies to long-term pollution or contamination cases. In this case, the dispute involved claims arising from Kaiser Cement & Gypsum's manufacture of asbestos-containing products between 1944 and the 1970s, resulting in thousands of claims implicating many years' insurance coverage at the primary and excess level.

The issue in this case is whether a standard first-level excess insurance policy becomes applicable upon exhaustion of underlying primary insurance obtained for the same policy period (vertical exhaustion), or whether all primary policies issued during the continuous period of damage must be exhausted before any excess policy applies (horizontal exhaustion). The rule of horizontal exhaustion generally relied on application of "other insurance" clauses and had been adopted by intermediate California appellate courts in several cases, but in Montrose Chemical Corp. of California v. Superior Court (2020) 9 Cal.5th 215 (Montrose III), a case in which all primary and first-level excess policies had long been exhausted, the Supreme Court adopted a vertical exhaustion rule as between the upper-level excess policies at issue in that case.

Truck Insurance Exchange was a primary insurer of Kaiser. Relying on Montrose III, Truck filed an equitable contribution claim against first-level excess Insurers of Kaiser for policy years where the directly underlying primary policy had been exhausted, arguing that the excess insurers' indemnity obligations were triggered immediately upon exhaustion of their directly underlying primary policies. Truck contended that because these excess insurers owed indemnity to Kaiser on the same claims, they could be required to contribute with Truck.

The excess insurers argued that they had no duty to indemnify Kaiser until it had exhausted every primary policy issued during the period of continuous damage, including the Truck policy, so Truck had no claim for contribution. They argued that Montrose III only applied to policies that were excess over other excess policies, not first-level excess policies that applied after exhaustion of primary policies, and the Court of Appeal agreed. Truck appealed.

The Supreme Court reversed, pointing out that the policies' excess provisions were essentially identical to those construed in Montrose III, making the policies excess to the primary policy listed in the Declarations and any other underlying insurance collectible by the insured, or similar wording, none of which referred to insurance purchased for different policy periods. The Supreme Court pointed out that such "other insurance" provisions have typically been understood to refer to other insurance issued for the same policy period, and if they refer to a specific underlying policy it is inevitably one that applies to the same policy period.

While Montrose III involved an insured's action for coverage based on the policy language, the current case was for contribution based on equitable principles, so the Supreme Court acknowledged that Montrose III did not address all relevant issues. The excess carriers argued the differences between primary and excess policies, which are priced differently and have a different function, should affect the equities of the contribution claim. Because the Court of Appeal had not considered these issues, the case was remanded so the Court of Appeal could address those arguments. We may see a further opinion as a result.

JPA ADMINISTRATION AND COVERAGE CASES- CONTINUED

By: Douglas Alliston, Alliston Law Office

Stone v. Alameda Health System (2024) _ Cal.5th _

Summary: Health authority created by county Board of Supervisors as authorized by the legislature is not subject to liability for wage and hour violations and civil penalties under the Private Attorneys General Act (PAGA).

Discussion: After obtaining legislative authorization, the Alameda County Board of Supervisors created the Alameda Health System (AHS). The enabling legislation (Health and Safety Code § 101850) provided that the health authority would be a "separate public agency."

Plaintiffs in the Stone action were employees of Highland Hospital, part of AHS, who brought a wage and hour and PAGA action against AHS. AHS successfully demurred to the wage and hour and PAGA claims in the trial court, on the basis that as a public agency it had no liability under the wage and hour and PAGA statutes.

The Court of Appeal reversed in part on the basis that the enabling statute included nothing indicating that AHS was exempt from the meal and rest period and payroll requirements underlying plaintiffs' first three causes of action and the wage payment statutes referenced in the fifth and sixth causes of action, in part because it deemed AHS to be a "municipal corporation" without sovereign government powers and because it deemed the penalties not to be punitive in nature so as to trigger application of Government Code § 818, which bars imposition of punitive damages on public agencies.

AHS appealed and the Supreme Court reversed the Court of Appeal, restoring the trial court's ruling in favor of AHS, in part because as a public agency it did not fall within the definition of "employer" as used in the relevant meal and rest break laws, which refers specifically to individuals and business entities but not public agencies. Also, the relevant wage orders specifically exempted public agencies, and the enabling legislation consistently described AHS as a public agency. Thus, the statutes were not enforceable against AHS.

Moreover, the Supreme Court found imposition of PAGA penalties on a public agency was incompatible with the policy concerns underlying Government Code section 818, which exempts public agencies from liability for punitive damages and damages imposed primarily to punish and make an example of the defendant.

JPAs with employees should be able to rely on this case in the event of a PAGA action against them.

Another Planet Entertainment, LLC v. Vigilant Ins. Co. (2024) 15 Cal.5th 1106

Summary: Presence of the COVID-19 virus does not constitute "direct physical loss or damage" within the meaning of property insurance policies.

Discussion: This case came to the California Supreme Court by a referral from the U.S. Court of Appeals for the Ninth Circuit, seeking clarification of California law in the context of lawsuits by business owners who suffered financial losses due to the pandemic. The Supreme Court concluded that "Under California law, direct physical loss or damage to property requires a distinct, demonstrable, physical alteration to property," which need not be visible or structural, but must result in some injury to or impairment of the property as property.

In so holding, the Supreme Court rejected the insured's argument that the virus alters property by bonding or interacting with it on a microscopic level, even though the alteration does not affect its relevant physical characteristics. It also rejected an argument that the presence of the virus renders property unfit for its intended use and therefore constitutes property damage.

The opinion is notable for its extensive discussion of the history of property insurance policies, including the phrase "direct physical loss or damages", which may lead to it being cited frequently in future property insurance cases.

JPA ADMINISTRATION AND COVERAGE CASES- CONTINUED

By: Douglas Alliston, Alliston Law Office

John's Grill, Inc. v. The Hartford Fin. Servs. Grp. (2024) _ Cal.5th _

Summary: The cause of loss limitation in a "Limited Fungi, Bacteria or Virus Coverage" endorsement is enforceable.

Discussion: In this action, the policy under consideration included a "Limited Fungi, Bacteria or Virus Coverage" endorsement which excluded coverage for any virus-related loss or damage that the policy would otherwise provide, but it extended coverage for virus-related loss or damage if the virus was the result of certain specified causes of loss, including windstorms, water damage, vandalism, and explosion.

John's Grill in San Francisco alleged that the cause of loss limitation was invalid because the listed causes of loss were unlikely to cause virus-related losses, rendering the policy's extension of virus-related coverage illusory. The Court of Appeal agreed. Hartford appealed to the California Supreme Court, which concluded that the endorsement was clear and unambiguous and therefore enforceable according to its terms.

Somewhat surprisingly, the Supreme Court cast doubt on whether the doctrine of illusory coverage existed in California, noting it had never recognized an illusory coverage doctrine and that, "even assuming some version of the doctrine may exist under California law, we conclude that an insured must make a foundational showing that it had a reasonable expectation that the policy would cover the insured's claimed loss or damage." Since John's Grill had not shown it had a reasonable expectation of coverage under the policy for its pandemic-related losses, there was no occasion to consider whether coverage was illusory.

The Supreme court then commented: "Moreover, even setting aside this hurdle, and accepting John's Grill's articulation of the doctrine, it still cannot demonstrate that the policy's promised coverage was illusory. Even with the specified cause of loss limitation, the policy offered John's Grill a realistic prospect for virus-related coverage."

Interestingly, both the Court of Appeal and Supreme Court considered the case on the merits despite a settlement while the appeal was pending, citing issues of continuing public interest that were likely to recur.

The Pep Boys Manny Moe & Jack of California v. Old Republic Ins. Co. (2023) 98 Cal.App.5th 329_

Summary: Aggregate policy limits stated to apply on an annual basis provided more than one annual aggregate for policies in effect for 17-month period.

Discussion: In 1981 and 1982, Pep Boys purchased 17-month long policies in its tower of coverage to bring its insurance policy periods into sync with its fiscal year. By 2004, Pep Boys sought coverage for hundreds of asbestos claims brought by customers who bought asbestos containing products from Pep Boys. The companies that issued the February 1, 1981, to July 1, 1982, policies took the position that only a single aggregate limit applied, while Pep Boys took the position that each such policy provided two annual aggregates based on language stating the aggregate applied to each annual period. The Supreme Court pointed out that the insurers wanted to treat 17 months as a single annual period, and that Pep Boys wanted to treat the 5-month period after the first twelve months as a second annual period, and that neither position was consistent with a literal reading of the policy language.

Extrinsic evidence tended to show that Pep Boys was not looking to dilute its coverage or save money at the time it bought the policies, but the court found this evidence less than definitive and concluded the remaining ambiguity would have to be construed against the insurers. There was no provision for proration of aggregate limits, so the court acknowledged this arguably provided Pep Boys with the windfall of an extra year's aggregate limit for five months' prorated premiums.

One company's policies included different language that had a different effect. A second layer policy issued by American Excess stated its aggregate liability would be limited to the amount stated in the declarations, and did not refer to annual periods,

JPA ADMINISTRATION AND COVERAGE CASES- CONTINUED

By: Douglas Alliston, Alliston Law Office

so the Supreme Court concluded that policy provided just one aggregate limit despite being in effect for 17 months.

While JPAs generally do not write coverage for other than annual periods, if a new member is admitted mid-year, this case is instructive about the importance of unambiguously addressing the issue of aggregate limits for periods other than a full year.

Apex Solutions v. Falls Lake Insurance Management (2024) 100 Cal.App.5th 1249

Summary: A single per-occurrence limit applied to a cannabis burglary despite two different groups attacking two different inventory vaults at two different times during one night.

Discussion: Apex reported a burglary to the police, stating initially that a large group congregated in front of its business and that one man was issuing orders to the group, which cooperated with each other. Months later, Apex took the position that there were two groups that entered over an hour apart, constituting two separate occurrences.

At the time of the burglary, Falls Lake insured Apex for such losses, with a Cannabis Inventory limit of liability of $600,000 per occurrence. Apex reported a loss of over $2.5 million and requested payment. Falls Lake reserved its rights as to the number of occurrences and took the position that there had been a single occurrence. Apex sued, and Falls Lake obtained a summary adjudication in its favor. Apex appealed.

Falls Lake's Property Coverage, Section A, stated that it would "pay for direct physical loss of or damage to Covered Property" at the listed premises "caused by or resulting from any covered cause of loss." "Direct physical loss" included loss by theft. The policy stated that for loss to merchandise held for sale, the most the insurer would pay for such loss was a per occurrence limit listed on the Declarations, which for Cannabis Inventory Coverage was $600,000. The property portion of the policy did not define "occurrence," and Apex contended that the term would be understood as a single event, and because the surveillance video and time-stamps showed breaches of the two vaults by different people at different times, separated by nearly an hour, there were two occurrences.

The Court of Appeal stated that when an undefined term has been judicially construed, that construction should be read into the policy unless the parties express a contrary intent. California courts have construed the word occurrence in this context to refer to the underlying cause of injury, rather than the injury itself. Citing a case involving deductibles and allegedly coordinated thefts, EOTT Energy Corp. v. Storebrand International Insurance Co. (1996) 45 Cal.App.4th 565, the court held that the relevant issue was the number of causes of loss, which in that case was the single coordinated series of thefts. The conclusion that occurrence in this context referred to causes of loss was bolstered by the Declarations listing the various sub-limits under the heading Covered Causes of Loss. The court concluded that, to be a single occurrence, the cause of loss must "be so closely linked in time and space as to be deemed by the average person as a single event." The police report's description of a group of people being directed by a leader on the same night constituted a single occurrence, at least where the insured was unable to refute testimony that the video surveillance showed continuous activity on the night in question, constituting a single occurrence for purposes of the policy limit.

City of Whittier v. Everest National Ins. Co. (Dec. 6, 2023) 97 Cal.App.5th 895

Summary: Insurance Code § 533's prohibition of insurance for willful acts does not necessarily preclude coverage for retaliation in violation of Labor Code § 1102.5.

Discussion: Insurance Code section 533 prohibits the insuring of willful acts. In this case, insurers Everest National and Starr Indemnity, had issued public entity excess liability insurance policies to the California Insurance Pool Authority (CIPA), a JPA which included the City of Whittier. Whittier as well as the CIPA were named as insureds.

In 2015, officers in the Whittier Police Department

JPA ADMINISTRATION AND COVERAGE CASES- CONTINUED

By: Douglas Alliston, Alliston Law Office

filed a lawsuit alleging the Department had instituted an unlawful citation and arrest quota and engaged in other unlawful employment practices, and retaliated against the officers when they refused to participate or reported the unlawful practices. Plaintiffs alleged retaliation in violation of Labor Code section 1102.5, subdivision (b) of which provides in relevant part:

An employer … shall not retaliate against an employee for disclosing information…. to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation ….

Subdivision (c) provides in relevant part:

An employer … shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or non-compliance with a local, state, or federal rule or regulation.

A plaintiff suing under section 1102.5 must prove a causal link between his protected activity and the employer's adverse employment action, which is an action that materially affects the terms, conditions, or privileges of employment, but the plaintiff is not required to prove the employer knew its conduct was illegal.

The City settled the officers' action at mediation for $3 million. Insurer representatives attended the mediation declined to consent to the settlement, and later refused to indemnify it. The City then sued Everest and Starr, and the insurers sought summary judgment on the basis that retaliation claims under Labor Code section 1102.5 necessarily involved uninsurable willful acts under Insurance Code section 533, and trial court ruled in their favor.

The City appealed.

The court found no case law on point. It distinguished cases involving retaliation in other contexts where there was no doubt about the employer's intent, and opined that section 1102.5 could be violated by an employer without an intent to harm, or even where it was attempting to follow the law. For example, the employer could be mistaken about whether the ordered activity is actually unlawful and might only learn it was unlawful by having the court rule on the employee's challenge. Such a scenario could give rise to liability without intent to harm, and providing insurance in that scenario would not encourage wrongdoing. The underlying suit did not involve clearly illegal conduct that the City could not reasonably have believed was legal. Accordingly, the Court of Appeal found that Insurance Code section 533 did not bar coverage for the City's liability for retaliation under Labor Code section 1102.5.

The Court of Appeal's published decision in this case did not mention the unpublished 2022 federal district court decision finding that Insurance Code section 533 precluded Everest National from providing coverage to the County of Sacramento for retaliation liability under the Fair Employment and Housing Act, nor the unpublished 2023 Ninth Circuit decision affirming the district court. The earlier federal court County of Sacramento decisions are arguably distinguishable because they were based on the FEHA rather than the Labor Code, and because there was a jury verdict in the County of Sacramento case, but an argument can be made, based on the similar standards for liability under the two statutes, that the federal court decisions were inconsistent with what we now know about California law due to the City of Whittier decision.

WORKERS' COMPENSATION CASES

By: Anne Hernandez, Mullen & Filippi, LLP

Velasquez v. Workers' Compensation Appeals Board (Ortiz) (2023) 97 Cal.App.5th 844

Summary: The Salvation Army's Residential Rehabilitation Program is not an employer per Labor Code Section 3301(b). Based on the facts available, it was unclear whether the County of Santa Barbara was applicant's employer.

Discussion: Applicant Velasquez pled guilty in Santa Barbara County Superior Court to a felony count of forgery. The court suspended pronouncement of judgment and placed Velasquez on supervised probation for three years with terms including that he enter into and complete a residential treatment program as directed by Probation. Velasquez entered The Salvation Army's residential adult rehabilitation center in Santa Monica for substance abuse treatment. The Salvation Army is a private, nonprofit organization. Its residential treatment program is a six-month program provided at no cost to the beneficiaries. The program includes 12 hours per week of counseling, attendance at weekly religious services, meditation, and a work therapy component during which participants work in The Salvation Army's warehouse. The work therapy component, according to the court, is designed to help individuals become productive members of society.

Velasquez was injured while moving furniture at The Salvation Army's warehouse and sought workers' compensation benefits for his injuries. Both The Salvation Army and the County denied his claim for benefits.At the administrative hearing, the issues were identified as employment; whether applicant was an employee of The Salvation Army when he was the beneficiary of a court-mandated drug diversion program per Labor Code (LC) section 3352; and applicability of LC sections 3351 and 3301. There is conflicting evidence regarding whether or not he was given a choice of programs; Velasquez testified he was not given a choice. Of note, Velasquez's intake paperwork at The Salvation Army noted that it was a work therapy program and that he may be required to perform manual labor. He signed a waiver form in which he agreed he was not an employee entitled to workers' compensation coverage and that he would not sue for personal injury, disability or death whether caused by the negligence of The Salvation Army or not.The Court of Appeal advised in a footnote that such contractual compensation waivers are invalid per LC section 5000.

The Workers' Compensation Judge (WCJ) concluded that Velasquez was not an employee of either The Salvation Army or the County and ordered a "take nothing" against either. Velasquez petitioned for reconsideration and the Board granted the petition for reconsideration but deferred ruling on the merits pending "further study." Approximately 2 years later, on May 31, 2022, the Board issued its opinion on decision after reconsideration affirming the WCJ's order.The Board relied on Arriaga v. County of Alameda (1995) 9 Cal.4th 1055, 40 Cal.Rptr.2d 116, 892 P.2d 150 (Arriaga) and Dominguez v. County of Orange (Apr. 8, 2016, ADJ 8935451), 2016 WL 1551445, 2016 Cal.Wrk.Comp. P.D. LEXIS 180 (Dominguez) and concluded The Salvation Army was exempt from providing workers' compensation as a nonprofit sponsor per LC section 3301(b) and that the County did not employ Velasquez because it did not exercise control over his working conditions.

Velasquez filed a Petition for Writ of Review, which was granted. In its briefing filed with the Court of Appeal, the Board requested the decision be annulled and the matter remanded to the Appeals Board for further consideration of whether Velasquez was an employee of the County, noting that the record was deficient on this issue, and whether the Salvation Army was his employer. The Court of Appeal denied the Board's request for remand on the issue of whether The Salvation Army was applicant's employer, noting that this had been fully litigated, but granted the request for remand on the issue of whether the County was applicant's employer. The Court of Appeal affirmed the Board's decision as to its conclusion that The Salvation Army was not Velasquez's employer.

The opinion notes that LC section 3301(b) excludes from the definition of employer "any private

WORKERS' COMPENSATION CASES- CONTINUED

By: Anne Hernandez, Mullen & Filippi, LLP

nonprofit organization while acting solely as the sponsor of a person who, as a condition of sentencing by a superior or municipal court, is performing services for the organization." The Court of Appeal found The Salvation Army was exempt from liability pursuant to Arriaga, which addressed the liability of a county and Caltrans for an injury caused during community service work. Arriaga concluded that both the county and Caltrans were employers for community service work. The Court of Appeal noted that Caltrans is a government agency and that the exception in LC section 3301(b) applies only to a "private nonprofit organization." The Arriaga court stated, "In all cases, the county will remain liable for workers' compensation because it is the 'general' employer…But if the county assigns the person to work for a private nonprofit organization, that organization will not be liable for workers' compensation because [§3301(b)] specifically exempts it from employer status." The Court of Appeal rejected applicant's argument that The Salvation Army was excluded from the exception per LC section 3301(b) because the superior court had not ordered him to perform public or community service, but rather a residential treatment program noting that there was no distinction between the two in the statute.

With regard to whether the County was an employer, the Court of Appeal noted that the trial court record was insufficient on that issue. The Court of Appeal cited County of Los Angeles v. WCAB (Conroy) (1981) 30 Cal.3d 391 which outlines three factors used to determine whether a county is an employer: control over the work, benefit to the county, and exposure to the same risks of employment faced by regular employees.Of note, the facts indicate that Velasquez worked 5-6 days a week in the warehouse and worked with regular employees including supervising other workers. During the program, applicant had no contact with the County. However, The Salvation Army contacted his probation officer and reported everything he was doing and how he behaved.

Roberts (Deceased) v. County of Inyo (2023) 2023 WL 8079106

Summary: Due to a lack of diagnosis in a psyche Agreed Medical Evaluators' (AME) report, remand of the matter was required to obtain decedent's psychiatric condition.

Discussion: Applicant filed two Applications for Adjudication following the death of her police officer husband, Lewis Roberts. Applicant's first claim alleged that decedent sustained an industrial psychiatric injury resulting in death by suicide on September 21, 2016 compensable pursuant to Labor Code (LC) section 3208.3. The second claim sought special death benefits from CalPERS pursuant to Government Code section 21166.

While employed by defendant, decedent was subject of an internal investigation regarding possible workplace misconduct. The investigation resulted in two notices of intent to terminate decedent's employment, following which decedent committed suicide.

The parties utilized an Agreed Medical Evaluator (AME) Katalin Bassett, M.D. in the specialty of forensic psychiatry who issued a report finding that Officer Roberts' suicide was predominantly caused by industrial factors, but was not the result of "irresistible impulse." The AME also concluded that exposure to personnel actions was a substantial cause of applicant's psychiatric injury. The AME provided no psychiatric diagnosis of decedent in her reporting.

The parties proceeded to trial and, on August 22, 2023, the workers' compensation judge (WCJ) issued a Findings and Order denying applicant's claims in full. The WCJ first rejected applicant's claim under section 3208.3 finding that, without a psychiatric diagnosis, there was no industrial injury pursuant to LC section 3208.3(a) and therefore decedent's suicide could not be found to be a compensable consequence. The WCJ also found that applicant did not meet her burden to show there was an industrial psychiatric injury or that decedent's suicide was a consequence of a compensable psychiatric injury. Consequently, the WCJ issued a take nothing Order. The WCJ further found that applicant failed to prove industrial injury under Government Code section 21166. The WCJ found that the evidence showed

WORKERS' COMPENSATION CASES- CONTINUED

By: Anne Hernandez, Mullen & Filippi, LLP

that decedent's death was non-industrial for purposes of Government Code Section 21166 based upon Dr. Bassett's testimony that decedent's suicide "was motivated by monetary concerns for his family."

Decedent's widow sought reconsideration of the WCJ's Findings and Order. The Workers' Compensation Appeals Board (WCAB) inquired whether there was substantial evidence to support the WCJ's finding that decedent did not sustain a psychiatric injury arising out of an in the course of (AOE/COE) his employment and that decedent's death was non-industrial.Applicant argued, and the WCAB agreed, that the reporting of Dr. Bassett was incomplete and did not constitute substantial evidence upon which the WCJ could rely in reaching any decision on industrial injury. The WCAB noted that Dr. Bassett failed to issue a determination regarding a psychiatric diagnosis and did not provide enough detail of the records reviewed explaining the impact of the recorded events on decedent's psyche. Therefore, the WCAB concluded the medical evidence was insufficient to reach a determination on industrial injury. Accordingly, the Board panel remanded the matter for further development of the record, ordering the parties to return to the AME to cure the defects in her reporting or, if it could not be cured, to select a different AME or have the court appoint a physician pursuant to LC section 5701.

Utterback v. County of Los Angeles (2023) 2023 WL 5217994

Summary: 4850/Temporary Disability for specific and cumulative trauma (CT) injuries ran concurrently where both contributed to applicant's low back injury.

Discussion: Applicant, a firefighter, claimed a specific injury January 23, 2019 to his low back and a cumulative trauma (CT) injury to the neck, low back, feet, knees, right hip, shoulders, left elbow, upper extremities, heart/cardio, and hearing for the period from January 1, 1998 through January 22, 2019.

Applicant argued that the medical evidence established two discrete periods of temporary disability (TD); an initial period arising out of the specific injury and a subsequent and distinct period of disability attributable to the CT.Defendant contended that its payment of 104 weeks of 4850/TD commencing January 23, 2019 arose out of applicant's low back injury and that both the specific and CT injuries contributed to the low back injury. Accordingly, the TD arising from both injuries ran concurrently for 104 weeks.

Following trial, the Workers' Compensation Judge (WCJ) issued Findings of Fact indicating that the carrier paid 4850 benefits for the period January 24, 2019 through January 23, 2020 and temporary disability pursuant to Labor Code (LC) section 4656 from January 24, 2020 through January 20, 2021. He further found that applicant was concurrently temporarily disabled commencing January 24, 2019 for both the specific CT injuries; that applicant had received the maximum 104 weeks of LC section 4850/Temporary Disability for the two injuries; and that he was not entitled to additional LC section 4850/TD indemnity.

Applicant sought reconsideration. In its opinion denying reconsideration, the WCAB noted that Independent Medical Evaluator (IME) Dr Steven Silbart initially determined that applicant's need for TD arose solely out of the admitted specific injury, but that the IME later acknowledged that applicant's low back injury was attributable to both the specific as well as the CT injury sustained over the length of his firefighting career. Citing to the panel decision in *Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505 [73 Cal.Comp.Cases 466], the WCJ concluded that applicant's TD commencing in 2019 arose out of his lumbar spine injury and that because the lumbar spine injury arose out of both the specific and cumulative injuries, any resulting periods of TD ran concurrently.

The WCAB observed that the analysis of overlapping TD outlined in Foster applied to applicant's cases. Pursuant to Foster, when temporary disability is concurrently caused by two or more injuries, the statutory cap under LC section 4656(c)(2) for those

WORKERS' COMPENSATION CASES- CONTINUED

By: Anne Hernandez, Mullen & Filippi, LLP

injuries runs concurrently. Thus, if applicant's need for TD arose out of both the specific and CT injuries, the 104-week limitation runs concurrently.

The Panel also relied on *Brum v. DPIX* 2007 Cal. Wrk. Comp. P.D. LEXIS 199 wherein the WCAB explained:

Where separate injuries result in concurrent periods of temporary disability, the 104-week/two-year limitation likewise runs concurrently. To determine the impact of section 4656, in a case involving multiple injuries, the evidence needs to be examined to determine whether any periods of temporary disability are distinct and independent, staggered, or entirely overlapping. (Cf.City of Montclair v. Workers' Comp. Appeals Bd. (Leone) (2001) 66 Cal.Comp.Cases 899, writ denied; City of Lompoc v. Workers' Comp. Appeals Bd. (Coday) (1984) 49 Cal.Comp.Cases 248, writ denied (entitlement to multiple periods of section 4850 benefits for separate periods of temporary disability due to separate injuries).) If there is total overlap, the applicant will be entitled to only one period of temporary disability indemnity consisting of 104 weeks within two years of the first payment. If separate periods of temporary disability are not completely overlapping, the applicant may be entitled to additional temporary disability indemnity; however, the applicant is not entitled to double recovery for overlapping periods.

Here, the Panel noted that Dr. Silbart had endorsed the causal relationship between applicant's CT claim and the development of lumbar spine pathology. The Panel agreed with the WCJ that the TD period commencing January 24, 2019 was necessitated by applicant's lumbar spine injury. Accordingly, the Panel affirmed the WCJ's determination that both injuries gave rise to the need for TD and that the TD for both injuries ran concurrently.

The Panel further acknowledged applicant's reliance on the opinion of Dr. Silbart who indicated that while the CT contributed to applicant's permanent disability (PD), the need for TD was attributable solely to the specific injury.In rejecting this argument, the Panel observed that while there can be apportionment of liability for TD between two or more defendants, there can be no apportionment of the injured employee's entitlement to indemnity for TD. (Granado v. Workmen's Comp. Appeals Bd. (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647].

The WCJ and the WCAB go to great lengths to state that both the CT and specific injury combined to cause applicant's lumbar spine pathology, which gave rise to the need for TD/4850, and that consequently, the resulting periods of TD ran concurrently as to both injuries. This raises the question of whether its holding would apply in cases where there are multiple injuries with overlapping or slightly staggered periods of TD, but where there is not a "causal relationship" between the injuries and the need for TD. For example, it is unclear whether this holding would apply where an applicant has a specific orthopedic injury followed shortly thereafter by a psych injury, both giving rise to TD during the same time periods.

Nunes v. California Department of Motor Vehicles (2023) 88 Cal.Comp. Cases 741

Summary: Vocational evidence must address apportionment and may not substitute impermissible vocational apportionment in place of otherwise valid medical apportionment.

Discussion: Applicant, a Department of Motor Vehicles (DMV) Field Representative, claimed two admitted industrial injuries while employed by defendant; a September 13, 2011 injury to the neck, upper extremities, and left shoulder; and a cumulative trauma (CT) injury through September 13, 2011 to the bilateral upper extremities.

On May 17, 2016, the orthopedic Qualified Medical Evaluator (QME), Dr. Melinda Brown, opined that there was 100% industrial causation for the left shoulder and 60% industrial causation for the cervical spine. The QME apportioned the remaining 40% to preexisting degenerative factors. The QME further ascribed applicant's carpal tunnel symptoms to the CT with 40% industrial causation, apportioning 60% to nonindustrial diabetes. On March 16, 2021, the QME issued a reevaluation report opining that applicant

WORKERS' COMPENSATION CASES- CONTINUED

By: Anne Hernandez, Mullen & Filippi, LLP

could not participate in the open-labor market based on pain and lack of function.

On June 18, 2021, applicant's vocational expert, Gene Gonzales, evaluated applicant and issued a report finding a 100% loss of access to the open labor market. He acknowledged the QME's apportionment opinion but opined that vocational apportionment is not the same as medical apportionment and that her preexisting degenerative conditions had zero percent impact on her earning capacity. Further, Mr. Gonzales found that, standing alone, her functional limitations and chronic pain rendered her 100% permanently disabled and that vocational apportionment was 100% industrial, as she had been capable of performing usual and customary work without impediment until the specific injury.

On January 31, 2022, defense vocational expert, Steven Koobatian, evaluated applicant and agreed her employability in the competitive labor market was unlikely, but detailed her nonindustrial factors of apportionment as identified by the QME and attributed 10% "vocational apportionment" of her inability to compete in the open labor market to non-industrial medical factors.

On December 5, 2022, the parties went to trial on the issues of permanent disability (PD), apportionment, applicant's attorney's fees and whether applicant rebutted the AMA Guides for permanent total disability (PTD). The workers' compensation judge (WCJ) found that applicant was entitled to an un-apportioned award of 100% industrial disability based upon there being no evidence of previous loss of earnings capacity.

Defendant filed a petition for reconsideration arguing that applicant did not rebut the scheduled rating under Labor Code (LC) section 4660 (for injuries occurring before January 1, 2013); that substantial medical evidence supported apportionment to nonindustrial factors; and that applicant's preexisting disability is presumed to be present at the time of the September 13, 2011 date of injury. The WCJ recommended the Petition be granted to clarify that applicant's temporary and permanent disability arose solely out of the specific injury.

The Appeals Board observed that, pursuant LC section 4664(c), for the physician's report to be complete on the issue of PD, an apportionment determination must be made by finding the approximate percentage of the PD that was caused as a direct result of the industrial injury and the percentage caused by other factors from before and after the industrial injury, including other industrial injuries. The WCAB discussed that LC section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for same without any statutory provision for "vocational apportionment," explaining that employers are only liable for that portion of PD attributable to a current industrial injury. The Panel further found that "vocational apportionment" offered by a non-physician is not a statutorily authorized form of apportionment, deviates from the mandatory standards described in 4663(c), and is not a valid basis for permanent disability.

The WCAB also discussed and affirmed that vocational evidence can be used and submitted in order to address issues relevant to the determination of PD; that LC section 4660 provides that PD is determined by consideration of whole person impairment (WPI) within the four corners of the AMA Guides, 5th Ed., as applied by the rating schedule; but that the ratings schedule may be rebutted by showing a diminished future earning capacity that is greater than that reflected in the Permanent Disability Rating Schedule. The Appeals Board noted that an evaluating physician must consider the vocational evidence as part of their determination of PD including feasibility for vocational rehabilitation, whether the reasons underlying non-feasibility for it arise solely out of the present industrial injury or are multifactorial.

Finally, the Appeals Board found that, though vocational evidence may be utilized to assess factors of PD, such evidence must consider valid medical apportionment. Where there is evidence of prior disability, unrebutted, the WCAB should parcel out the causative sources and decide the amount directly caused by the current industrial source. Therefore, factors of apportionment must be considered even where an injured worker is

WORKERS' COMPENSATION CASES- CONTINUED

By: Anne Hernandez, Mullen & Filippi, LLP

permanently and totally disabled and unable to participate in vocational retraining. According to the Panel, the law requires evaluation of all factors of apportionment as long as supported by substantial medical evidence *regardless of whether they were the result of pathology, asymptomatic prior conditions, whether those factors caused diminished earnings, work restrictions, or inability to perform job duties and even when applicant is deemed not feasible for vocational retraining and is 100% totally permanently disabled.*

In this case, both vocational experts and the QME agreed that applicant was not feasible for vocational retraining, so she was totally permanently disabled.However, the Appeals Board found applicant's vocational expert's report did not adequately consider the issue of apportionment and engaged in speculation. Similarly, it found the defense vocational expert's report was not substantial evidence on apportionment as he did not explain how he arrived at the 10% figure. Therefore, the Appeals Board concluded the WCJ did not rely on an adequate and completely developed record. The Findings & Award failed to adequately address the issues submitted for decision including PD and apportionment for each injury claimed by applicant and did not explain in detail the WCJ's analysis as to each injury and the associated issues and finally, failed to cite the evidentiary record or legal authority. En banc, the WCAB overturned the Findings and Award issued by the WCJ, deciding the current medical and vocational record was analytically incomplete and sent it back to the trial level for further proceedings.

White v. City and County of San Francisco (2023) 2023 Cal. Wrk. Compd. P.D. LEXIS 129

Summary: An addendum to a Compromise and Release (C&R) attempting to settle all potential workers' compensation claims against defendant can be rendered void by the language contained in paragraph 3 of the C&R form.

Discussion: Applicant alleged a work-related cumulative trauma (CT) injury to the right knee during the period September 16, 2012 through December 30, 2014 arising out of his employment by the City and County of San Francisco. Applicant had previously settled a claim for a CT to the bilateral knees for the period from April 14, 2016 through April 14, 2017 by way of a Compromise and Release (C&R) dated March 28, 2022. Applicant also had a prior specific injury to the right knee (Date of Injury December 1, 2009) while employed by the San Francisco Municipal Railway (MUNI), which was settled November 1, 2013 by way of Stipulations with Request for Award at 18% permanent disability.

The C&R for the CT through April 14, 2017 incorporated an Addendum signed by applicant, applicant's attorney and the defense attorney and approved by the Workers' Compensation Judge (WCJ) for that claim, which stated in pertinent part as follows:

"This settlement is based on negotiations between the parties as well as a mutual desire to avoid additional hazards and delays of continued litigation. This is a full and final settlement of a denied claim with affirmative defenses. Defendant does not admit liability for this denied claim and defendant requests a Thomas finding as part of the settlement. Applicant is not eligible for the SJDB and applicant has seperated [sic] his employment with defendant (CCSF/MTA). This settlement resolves any and all claims for any and all species of Workers' Compensation Benefits related to applicant's employment with defendant."

On July 14, 2022, defendant denied applicant's claim of a CT to the right knee through December 30, 2014 based on a statute of limitations defense, a lack of medical evidence, and its assertion that in the March 28, 2022 C&R applicant agreed to resolve any and all claims for any and all species of workers' compensation benefits related to his employment with defendant. At trial, defendant asserted that the C&R covered the earlier CT period claimed by applicant through December 30, 2014 and that the language of the addendum barred the new CT claim. The WCJ concluded that the CT date range for the first CT was limited to the period from April 14, 2016 through April 14, 2017 as specified in paragraph

WORKERS' COMPENSATION CASES- CONTINUED

By: Anne Hernandez, Mullen & Filippi, LLP

1 of the C&R and that because the subsequent CT was for a period outside that date range, the C&R did not bar applicant's claim for the CT through December 30, 2014.

On Reconsideration, defendant argued that the plain language in the Addendum of the C&R resolving the CT through April 14, 2017 settled/barred any other potential CT claim. Defendant also asserted that because the language in the Addendum was reviewed and approved by the WCJ for that claim, the current WCJ engaged in an improper second review of the terms of the C&R and found them unenforceable.

The WCAB denied defendant's petition for reconsideration adopting and incorporating, in part, the report and recommendation of the WCJ. The WCJ stated that the parties are not afforded unlimited discretion in terms of their settlement and are constrained by the language contained in the C&R form including paragraph 3 on page 5 of the pre-printed DWC-CA form 10214 (Rev. 11/2008) which states, "This agreement is limited to settlement of the body parts, conditions, or systems and for the dates of injury set forth in Paragraph No. 1 despite any language to the contrary in this document or any addendum." The WCJ also noted that paragraph 1 on page 3 of the C&R form instructed parties to "state with specificity the date(s) of injury(ies) and what part(s) of body, conditions or systems are being settled." The WCJ further relied on non-binding panel decisions which found that language in paragraph 3 serves to nullify language in an addendum seeking to settle claims which are not listed in paragraph 1.

The WCJ rejected defendant's argument that the addendum barred applicant's CT through December 30, 2014 as this would constitute a "selective reading of that C&R" disregarding the language of paragraph 3. He further found that there was no need to inquire into the intent of the parties with respect to the C&R because the Addendum language relied on by defendant was rendered void by the plain restriction of paragraph 3, limiting settlement to the dates of injury listed in paragraph 1.

The lesson of this decision is that you must take into account the language of paragraph 3 when crafting any addendum. Further, the implications of the decision are that it may not be possible to use the C&R form or addendum to bar an applicant from making further claims against a defendant.

Silver v. Workers' Compensation Appeals Board (Ortiz) (2023) 88 Cal. Comp. Cases 1073

Summary: A lien claimant failed to meet its burden to prove an injury AOE/COE where a C&R stipulated injury AOE/COE was in dispute.

Discussion: Applicant alleged she sustained injuries to her bilateral hands, bilateral wrists, nervous system (psych)/brain, and other body systems during a cumulative trauma period from May 9, 2002 through May 9, 2003 purportedly arising out of and in the course of (AOE/COE) her employment as a department administrator for defendant, Kaiser Permanente Hospital. This claim was denied. Applicant also claimed injury to various body parts in five previous claims. All claims, including the denied cumulative trauma claim, were settled for $800,000 by way of a Compromise and Release (C&R) April 5, 2018.

Thereafter, Lien Claimant David Silver, M.D., filed a petition seeking, among other things, fees for treatment for the injury to applicant's hand and resultant fibromyalgia provided between February 19, 2004, and November 9, 2011, a 15 percent statutory increase under California Labor Code section 4603.2(b) (employer is obligated to provide payment for medical services within 45 days after receipt of each separate itemization of medical services provided), and allowance of fees above the Official Medical Fee Schedule (OMFS). Defendant paid a portion of the treatment charges pursuant to the OMFS, leaving a lien balance of $13,228.32 claimed by Dr. Silver.

Lien Claimant argued he was entitled to fees in excess of the OMFS because of the "extraordinary circumstances" related to the "unusual nature" of the services he provided. These arguments were based on the provisions of Administrative Director

WORKERS' COMPENSATION CASES- CONTINUED

By: Anne Hernandez, Mullen & Filippi, LLP

(AD) Rule 9792 as amended in 1999, however, pursuant to AD Rule 9790, that section is not applicable to physician services rendered after January 1, 2004 (Cal. Code Regs., tit. 8, § 9790.)

A lien trial was held March 19, 2019. The Workers' Compensation Judge (WCJ)'s issued his first Findings of Fact and Order stating that services provided by Lien Claimant were not "extraordinary" within the meaning of LC section 5307.1(b) as implemented by California Code of Regulations, title 8, section 9792(c).The WCAB granted Lien Claimant's Petition for Reconsideration.

The WCAB rescinded the WCJ's findings and order and returned the case to the WCJ noting, however, that the "extraordinary circumstances" provisions contained in section 5307.1(b) and section 9792 did not apply, as those provisions were deleted before Lien Claimant provided applicant any services. Further, the WCAB recognized that the issue of whether applicant's cumulative injury was industrial needed to be resolved, as it was critical to determining whether Lien Claimant had met his burden of proof under LC section 4600(a) (providing that medical treatment that is reasonably required to cure or relieve injured worker from effects of injury shall be provided by employer).

Lien Claimant filed a second Petition for Reconsideration following the WCJ's amended findings and order issued August 1, 2019, wherein the WCJ determined that applicant's cumulative trauma injury was not industrial. The WCAB granted reconsideration, rescinded the amended findings, and returned the matter to the WCJ. The WCAB noted that the C&R that settled applicant's claim did not establish, prima facie, that Lien Claimant was entitled to payment of his lien, as the release merely stated that there was no substantial medical evidence finding injury to the bilateral hands, bilateral wrists, and psych, and that the parties agreed that a take-nothing award could issue should the matter proceed in further litigation.

The matter was submitted for decision based on the trial record as set forth in the March 19, 2019 Minutes of Hearing and Summary of Evidence (MOH/SOE). The WCJ issued his Third Amended Findings of Fact and Order January 17, 2023, finding that lien claimant failed to meet his burden of proof that applicant sustained an injury AOE/COE. Lien Claimant again sought reconsideration contending that the issue of injury AOE/COE was not raised at trial and was thus waived or subject to equitable estoppel. Dr. Silver also argued that because he provided medical treatment for injuries included in applicant's C&R, he was entitled to a presumption that he established a prima facie case of entitlement to recovery on his lien.

The WCAB granted reconsideration and affirmed the WCJ's decision, noting that lien claimant has the burden of proof pursuant to Labor Code (LC) section 5705 to prove injury AOE/COE and that there was no authority supporting Dr. Silver's claim that defendant waived the issue of whether applicant's injury was industrial by failing to raise the issue at trial.

Iverson v. CVS Pharmacy Inc. (2023) 2023 WL 4344594

Summary: An injury resulting from a voluntary flu shot was compensable where the employer impliedly encouraged and benefited from the employee's vaccination.

Discussion: Applicant, a 28-year-old shift supervisor for CVS, alleged an August 11, 2019 injury to numerous body systems as a result of receiving a flu shot. On the date of injury, applicant arrived at work and was reminded by the pharmacist that free flu shots were available. Applicant agreed to receive a flu shot that day during her shift. That morning the pharmacist administered the Afluria Quad and Pneumovax 23 vaccine into applicant's left arm during a paid break from work. The next day, while at work, applicant began experiencing pain in the left arm and chest and noticed that her left arm was red with a burning sensation. She was urged to go to Urgent Care when these symptoms progressed to a feeling of dizziness/lightheadedness. Applicant did not return to work after that day.

At trial, the evidence showed that the employer had strongly encouraged employees to get their flu shots,

WORKERS' COMPENSATION CASES- CONTINUED

By: Anne Hernandez, Mullen & Filippi, LLP

which were administered for free at the store.Further, every year upper management set goals for each store for vaccinations. There was a positive consequence for meeting the vaccination target. Employees were offered a five-dollar coupon after vaccination and the store was rewarded with a pizza party for meeting its vaccination target.The store manager testified under oath at trial that the defendant would benefit from the employee vaccination program as it would help in avoiding sickness and make it easier for management to keep staffing levels at a proper point. Although employees were encouraged to get a vaccination, they suffered no negative consequence if they opted not to get the vaccine.

The WCJ held that applicant's flu shot injury was compensable because the employee's actions were reasonably anticipated by the employment, and the employer had at the least acquiesced to applicant getting the shot and had actively encouraged doing so with rewards. Further, defendant had sought and derived a benefit from employees' participation in the vaccine program.

Defendant petitioned for reconsideration arguing that to find compensability, it must be shown that vaccinations were either expressly or impliedly required by the employer, and that those vaccinations served as a benefit to the employer. The Appeals Board Panel denied defendant's petition for reconsideration, adopting the WCJ's report.

Defendant argued that, in this case, the vaccinations were voluntary, and the employees were free to get them, or not, as they wished. The WCJ noted that neither party disputed that if an employer required an employee to get a vaccination, then any injury arising therefrom would be compensable.

The WCJ relied on several cases including Integrated *Data Co. v. WCAB (Small)* (2001) 66 CCC 642 (writ denied) and *St. Agnes Medical Center v. WCAB (Cook)* (1998) 63 CCC 220 in support of the principle that where an employer impliedly requires a flu shot, an injury derived therefrom would be compensable.

In *Small*, the employee had an adverse reaction to a flu shot she received during her lunch hour at an employer sponsored event on the employer's premises, and which the employer had specifically informed the employees would be available to them at the event. Small held that an employee is deemed to be within the course of employment when he or she is performing an activity on the employer's premises during work hours that the employer expressly or impliedly has permitted and is reasonably contemplated by the employment.

In Cook, the WCJ observed there was a direct link between the employment and the injury as the employer "made all the arrangements except for the time the flu shot was actually given…" The WCJ noted that in both Cook and the instant case, the applicants took the flu shot, which was administered at work, during a work shift or during paid time. Thus, there was a causal connection between the applicant's employment and the injection. "This persuaded the board in Cook that the applicant was performing a service incidental to her employment and that obtaining the flu shot was a work-related event which proximately caused the injury."

The WCJ opined that the distinction between a compensable injury and a non-compensable "flu shot injury" is whether the employer impliedly permitted the vaccination and whether the act was reasonably contemplated by the employment. The WCJ also found that, based on Cook and other case law, a benefit to the employer from the vaccination must also be shown. Case law also indicated that no specific quantum of benefit is required, "only that some benefit is established." In this case, the employer benefited because having everybody vaccinated helped in avoiding sickness and keeping the staffing levels at a proper level. A further benefit to defendant from vaccinations was to help the store reach their vaccination goal.

Thus, applicant's injury was compensable as the employer impliedly permitted that vaccination, the employer benefited from the vaccination and the vaccination was reasonably contemplated by the employment.

WORKERS' COMPENSATION CASES- CONTINUED

By: Anne Hernandez, Mullen & Filippi, LLP

Vallejo v. Department of Developmental Services (2024) 2024 WL 125976

Summary: Defendant's due process rights were violated by an order compelling a claims administrator's deposition; however, the WCAB confirmed that claims administrators are subject to deposition.

Discussion: Relevant to these proceedings, applicant had three pending claims regarding injuries to "various body parts" for dates of injury September 14, 2014, April 14, 2015 and August 26, 2016. The claims handler sent a letter to the Agreed Medical Evaluator (AME) requesting clarification of the dates of injury and the AME's apportionment opinion, copying applicant's counsel on the correspondence. A few weeks later, defense counsel wrote to the AME inquiring whether a cumulative trauma injury existed, again copying applicant's attorney.

Prior to noticing the claims adjuster for deposition or issuing a subpoena, applicant's counsel petitioned the Board for an order "requiring SCIF to produce [the claims adjuster] for deposition" as well as for SCIF to produce the person most knowledgeable (PMK) regarding SCIF's overall adjuster training on the issue of California Labor Code (LC) section 4062.3 and Maxham v. CA Dept. of Corrections (2017) 82 Cal. Comp. Cases 136. The WCJ's order was voidable providing defendant objected, demonstrating "good cause" within 15 days.

Applicant's counsel asserted the communications with the AME were improper as ex parte and prejudicial. Defendant challenged the workers' compensation judge's (WCJ) voidable order, asserting that the communication was not ex parte; that the LC set forth no specific remedy if it was ex parte; that no prejudice resulted from the request to the AME; that deposition of the adjuster was unnecessary and burdensome; and lastly, that the Board had authority to fashion a remedy if it disagreed. After trial on the WCJ's discovery order, the WCJ issued a Findings and Order determining that applicant demonstrated good cause to permit the deposition of both the PMK and the claims adjuster, deeming his previous order final.

Defendant filed a petition for removal, asserting irreparable harm, particularly where the WCJ permitted the deposition prior to the creation of a proper record establishing the necessity and merits of the deposition.

Before the Appeals Board, defendant's main argument was procedural: applicant failed to first notice the claims adjuster's deposition or issue a subpoena, the mandatory procedural prerequisite which ensures the parties' due process rights to secure an accurate record. The Appeals Board agreed, rescinding the Joint Findings and Order, concluding that applicant failed to follow the mandatory procedural steps as set forth in LC section 5710, which include issuance of a subpoena or notice of deposition prior to seeking intervention by the Board.

While the Appeals Board did not specifically rule on the merits of whether applicant could depose the adjuster, it reiterated that the Appeals Board has historically considered the claims adjuster a party to an industrial action and subject to deposition. Further, the court noted that prior to determination of whether the adjuster may be deposed, the WCJ should first determine whether the claims administrator's communications with the AME were impermissible ex parte communications, defined by Maxham and Black's Law Dictionary as a communication that is "from one party only, usually without notice to or argument from the adverse party." (Black's Law Dict. (7th ed. 1999) p. 597. Col 2.) The Board panel rescinded the WCJ's order compelling the testimony of the adjuster and the PMK and remanded the matter for further development of the record regarding whether the defense communications with the AME were ex parte in violation of LC section 4062.3(f) followed by proper noticing of the deposition.

This case is a reminder that claims administrators are parties to an industrial action subject to deposition and that one must first notice a deposition before petitioning the WCAB for an order to compel deposition testimony.

CIVIL RIGHTS CASES

By: Attorney Noah G. Blechman, Esq., McNamara Law Firm

Johnson v. Barr, 79 F.4th 996 (9th Cir. 2023)

Summary: The Ninth Circuit affirmed the district court's grant of summary judgment to the defendants on the federal claims based on qualified immunity, but remanded the state law claims of false arrest and negligence. The court held that while a jury question existed on whether there was probable cause for Johnson's arrest, the officers were entitled to qualified immunity on the federal claims because the law was not clearly established that their actions violated Johnson's rights.

Discussion: On January 31, 2019, San Francisco police officers encountered Kristin Johnson, her five children, and her husband near a park. After observing signs of intoxication and potential child endangerment, officers arrested Johnson for public intoxication and child endangerment. Johnson sued, alleging constitutional violations and state law claims. The Ninth Circuit held that viewing the evidence in the light most favorable to Johnson, a reasonable jury could find the officers lacked probable cause to arrest her. However, the court found the officers were entitled to qualified immunity on the federal claims because Johnson failed to show that clearly established law put the officers on notice their conduct was unconstitutional. The court noted that while Johnson did not explicitly admit to being drunk, she acknowledged having a drink earlier, officers smelled alcohol on her breath, and there were open alcohol containers in the family's van. Given these circumstances, the court concluded a reasonable officer could have believed there was probable cause to arrest her for public intoxication or child endangerment, even if that belief was mistaken. The court remanded the state law false arrest and negligence claims, as qualified immunity does not apply to state law claims. The court also affirmed the denial of Johnson's motion to recuse the magistrate judge, finding no abuse of discretion. The prior opinion in this case was superseded by this opinion.

Paulette Smith v. Edward Agdeppa 81 F.4th 994 (9th Cir. 2023)

Summary: The Ninth Circuit reversed the district court's denial of qualified immunity to Officer Edward Agdeppa in a 42 U.S.C. § 1983 action because the officer's decision to use deadly force was objectively reasonable given the totality of the circumstances in light of the numerous warnings and non-lethal de-escalation tactics used prior to the shooting. Note, this case reversed a prior ruling by the Ninth Circuit denying qualified immunity.

Discussion: Two police officers were dispatched to a gym after a man, Albert Dorsey, allegedly threatened patrons and assaulted a security guard. Dorsey, approximately 6'1" and 280 pounds, was confronted by officers Edward Agdeppa and Perla Rodriguez, both about 5'5" and 140 pounds. Upon arrival, Dorsey, who was naked, refused to leave the gym locker room and resisted arrest, leading to a violent struggle. Despite multiple Taser deployments, Dorsey continued to attack the officers, eventually gaining control of a Taser and repeatedly punching Officer Rodriguez while she was on the ground. Officer Agdeppa then used lethal force to stop Dorsey. Agdeppa sustained a laceration and concussion, while Rodriguez suffered facial swelling, abrasions, and a pulled muscle.

The Ninth Circuit found that the district court erred in denying Agdeppa qualified immunity. The court noted that the precedent cited by the plaintiff was materially different, as the use of lethal force here followed prolonged attempts at non-lethal measures. The court emphasized that Agdeppa's actions were objectively reasonable given the escalating violence and the immediate threat posed by Dorsey, who had already gained control of a Taser and was beating an officer at the time of the deadly force. The Ninth Circuit also rejected the plaintiff's argument that Officer Agdeppa's failure to issue a warning before using lethal force was crucial in denying qualified immunity, noting that the officer had already given numerous warnings and commands to stop resisting during the struggle. The dissenting opinion would have upheld the district court's denial of qualified immunity, arguing that physical evidence and witness statements contradicted Officer Agdeppa's account. Additionally, the dissent felt that Officer Agdeppa should have issued a warning before using lethal force, as it was practicable to do so.

CIVIL RIGHTS CASES- CONTINUED

By: Attorney Noah G. Blechman, Esq., McNamara Law Firm

Waid v. County of Lyon, 87 F.4th 383 (9th Cir. 2023)

Summary: The Ninth Circuit affirmed the district court's grant of qualified immunity to police officers on Fourth Amendment excessive force and Fourteenth Amendment claims arising from the fatal shooting of Robert Anderson during a domestic violence call. The court held that the officers' actions did not violate clearly established law, even when viewing the facts in the light most favorable to the plaintiffs, even though decedent did not have a weapon and was not reaching for a weapon at the time of the shooting.

Discussion: Officers Wright and Willey responded to a domestic violence call at Anderson's home. Upon entering, Anderson shouted aggressively at the officers and ignored commands to get on the ground, instead running toward them down a hallway. The officers fired multiple shots, killing Anderson. The court found that while Anderson may have been unarmed and not reaching for a weapon, his aggressive language, refusal to comply with commands, and rapid approach toward the officers in a confined space meant it was not obvious that the use of force violated the Constitution. The court distinguished other excessive force cases where suspects were prone, compliant, or posing no immediate threat. Given the active domestic violence situation and need for split-second decisions as Anderson charged at them, the court concluded no clearly established law put the officers on notice their conduct was unconstitutional. On the Fourteenth Amendment claim, the court applied the "purpose to harm" standard given the rapidly escalating situation, finding no evidence the officers acted with an illegitimate purpose unrelated to law enforcement objectives. The court thus affirmed qualified immunity for the officers on all claims.

Moore v. Garnand, 83 F.4th 743 (9th Cir. 2023)

Summary: The Court of Appeals reversed the district court's order on summary judgment denying qualified immunity to police officers. The panel concluded that plaintiffs failed to show that defendants' conduct violated clearly established law as it was not clearly established that Mr. Moore had a First Amendment right to remain silent when questioned by the police. Nor was it clearly established that a retaliatory investigation violated the First Amendment. As such, defendants were entitled to qualified immunity on the First Amendment claims.

Discussion: On June 8, 2017, a fire broke out in a building due to arson. Mr. Moore was responsible for the building and arrived at the scene. He left once an investigator from the fire department told him he was free to leave. The next day, defendants went to Moore's office to question him. Moore's attorney advised him to remain silent, which he did. The officers told Moore they had a warrant to seize his cell phone and evidence from his person. However, he would not give up his cell phone. Officer Garnand took the cell phone, handcuffed Mr. Moore, and transported him to the police station. Plaintiffs made two First Amendment related claims. First, that defendants retaliated against Moore because he exercised his First Amendment right to remain silent when questioned. The court stated that plaintiff failed to identify a case that clearly established that a person has a First Amendment right to remain silent when questioned by the police. As such, defendants were entitled to qualified immunity. Second, plaintiffs claimed that in retaliation for him filing suit against Officer Garnand and the City of Tucson, defendants conducted a criminal investigation against him without any reasonable suspicion and attempted to induce the IRS into opening a criminal investigation.

The court held that since plaintiffs failed to meet their burden of showing that defendants' investigatory conduct violated clearly established law, defendants were entitled to qualified immunity.

Sabbe v. Washington Cnty. Bd. of Commissioners, 84 F.4th 807 (9th Cir. 2023)

Summary: The Court of Appeals affirmed the district court's summary judgment for claims that defendants violated plaintiff's Fourth Amendment rights by entering his private property without a warrant as well as shooting and killing plaintiff while he was inside his pickup truck. The panel held that the officers were entitled to qualified immunity and that

CIVIL RIGHTS CASES- CONTINUED

By: Attorney Noah G. Blechman, Esq., McNamara Law Firm

their actions did not constitute excessive force.

Discussion: Officers responded to a call from Mr. Sabbe's neighbor that Sabbe was driving a pickup truck erratically on a rural field on his property. The neighbor reported that Sabbe was drunk and belligerent, and may have fired a gun. The officers, in a large military type police vehicle, used a pursuit intervention technique and intentionally collided with Sabbe's truck in the field to stop him. The officers reportedly shot Sabbe after they thought they heard a gunshot and saw a rifle pointed at them. The Ninth Circuit stated that the officer's decision not to obtain a warrant was not at issue because it was not a proximate cause of Sabbe's death. Although the court held that a jury could find that the officer's conduct constituted excessive force, there was not clearly established law that would have provided adequate notice to a reasonable officer that the use of a vehicle to execute a low-speed intervention technique was unconstitutional. Additionally, the panel held that the officers were entitled to qualified immunity for shooting and killing Sabbe because the officers' split-second decision to open fire did not constitute excessive force.

Hart v. City of Redwood City, 99 F.4th 543 (9th Cir. 2024)

Summary: The Ninth Circuit reversed the district court's denial of qualified immunity to Officer Gomez on a Fourth Amendment excessive force claim arising from the fatal shooting of Kyle Hart during a suicide intervention. The court held that Officer Gomez's actions were objectively reasonable given the immediate threat posed by Hart, who approached officers with a knife while ignoring commands to drop it. Even if a constitutional violation occurred, the court found no clearly established law put Gomez on notice his conduct was unlawful.

Discussion: Officers Gomez and Velez responded to a 911 call about Hart attempting suicide with a knife. Upon arrival, they found Hart's wife covered in blood and frantically pleading for help. In the backyard, they encountered Hart holding a knife. When ordered to drop it, Hart instead approached the officers while wielding the knife, crossing the yard in less than 6 seconds. Officer Velez deployed her taser ineffectively, and Officer Gomez fired his weapon, fatally wounding Hart. The court found Gomez's actions objectively reasonable under Graham v. Connor, as Hart posed an immediate threat by rapidly approaching with a deadly weapon while ignoring commands. Even viewing disputed facts in plaintiffs' favor, the court concluded the material facts showed Hart's threatening advance justified the use of force. The court further held that even if a violation occurred, no clearly established law put Gomez on notice his actions were unconstitutional given the specific circumstances he faced. The rapidly unfolding of events and Hart's refusal to drop the knife while advancing distinguished this case from precedents involving passive, mentally ill suspects or situations where officers had more time to strategize alternatives to lethal force.

Est. of Hernandez v. City of Los Angeles, 96 F.4th 1209 (9th Cir. 2024)

Summary: The Court of Appeals affirmed the district court's grant of summary judgment for the plaintiffs' federal claims for excessive force, a 14th Amendment violation, and a Monell claim. The panel also reversed the district court's grant of summary judgment on plaintiffs' state law claims for assault, wrongful death, and violation of the Bane Act.

Discussion: On April 22, 2020, Officers McBride and Fuchigami stopped and investigated a multi-vehicle accident in Los Angeles. Multiple bystanders informed the officers that the man who caused the accident was in a truck with a knife. When the passenger of the truck started to climb out, Ofc. McBride yelled, "Let me see your hands" several times. The man, later identified as Hernandez, came out of the truck with a weapon in his hand. McBride yelled, "Stay right there," but he started to approach the officer. She yelled, "Drop the knife" three times, but Hernandez kept coming towards her while shouting. McBride continued to yell commands until she shot Hernandez two times causing him to fall to the ground with the weapon still in hand. Hernandez began getting up and McBride again yelled, "Drop it" and fired another two shots. Hernandez continued to move and McBride shot him another four times.

CIVIL RIGHTS CASES- CONTINUED

By: Attorney Noah G. Blechman, Esq., McNamara Law Firm

Hernandez died from his injuries. Plaintiffs filed three federal claims and three state claims. The panel affirmed the district court's grant of summary judgment for the federal claims because McBride was entitled to qualified immunity as she did not violate clearly established case law in her use of deadly force. The panel held that there was no 14th Amendment violation because McBride shot Hernandez with a legitimate purpose to stop a dangerous suspect. However, the panel reversed the grant of summary judgment for the state law claims because the reasonableness of McBride's fourth and fifth shots posed a question for a trier of fact.

Anthony Perez v. City of Fresno 98 F.4th 919 (9th Cir. 2024)

Summary: The Ninth Circuit affirmed the district court's summary judgment in favor of the City of Fresno on the Monell claims, and in favor of a paramedic and police officers based on qualified immunity. The officers were acting under the direction of a paramedic in an effort to provide medical aid. While only some officers might have been trained on the dangers of pressure asphyxiation, this does not automatically negate qualified immunity, as it was not clearly established that their actions or that of the paramedic would trigger a constitutional violation.

Discussion: In May 2017, Jacob Perez was restrained by police, lying on his stomach while officers and paramedics attempted to place him on a backboard for medical transport due to erratic behavior. The backboard was put on Perez's back despite his pleas that he could not breathe. An officer was instructed by the paramedic to sit on the backboard and he did so for three minutes before Perez was found without a pulse. Perez died of compression asphyxia. Perez's estate sued for excessive force and failure-to-train claims. The Ninth Circuit ruled that the officers and paramedic were entitled to qualified immunity, as their actions were intended to aid Perez and not harm him, and because officers are often trained to defer to medical personnel during treatment and transport, their actions, while perhaps fatal, were not unreasonable or excessive. The court also found no liability for the city, noting insufficient evidence of a training failure leading to repeated constitutional violations. The dissenting opinion argued that even if the paramedic directed the use of lethal force, police officers are not immune from liability for obviously unconstitutional actions simply because they were following instructions.

Rosa Cuevas v. City of Tulare, 2024 WL 3352710 (9th Cir. 2024, No. 23-15953)

Summary: The Ninth Circuit affirmed the district court's summary judgment in favor of police officers based on qualified immunity. Although the plaintiff was seized under the Fourth Amendment, she did not demonstrate that the force used against her had been clearly established as excessive at the time of the incident.

Discussion: Plaintiff Rosa Cuevas was in the passenger seat of her car with her friends. Castro was driving and Ware was in the back seat. After multiple traffic infractions, an officer tried to stop the car, but Castro initiated a high-speed chase that ended when the car got stuck in the mud. Despite Cuevas complying with officers and raising her hands, Castro resisted arrest. Officers broke the driver's side window and deployed a police canine, prompting Castro to fire shots, killing the canine and injuring its handler. In response, officers fatally shot Castro and seriously injured Cuevas. The Ninth Circuit ruled that the district court erred in determining Cuevas was not seized as the force used on Castro extended to Cuevas, constituting a Fourth Amendment seizure. However, the court also found Cuevas failed to establish it was a violation of clearly established law for officers to respond with deadly force when they are being shot at by a suspect and Cuevas' cited cases did not sufficiently match this incident. Castro posed a threat and the officers were entitled to immunity. The Ninth Circuit emphasized that the principle of 'obviousness' in excessive force cases must be clearly established and this was not an obvious violation.

Zachary Rosenbaum v. City of San Jose, 2024 WL 3366493 (9th Cir. 2024, No. 22-16863)

Summary: The Ninth Circuit affirmed the district

CIVIL RIGHTS CASES - CONTINUED

By: Attorney Noah G. Blechman, Esq., McNamara Law Firm

court's denial of qualified immunity to City of San Jose Police officers in this action of excessive force in the form of a canine bite. The Ninth Circuit found that when reviewing the facts in the light most favorable to the plaintiff, a reasonable jury could find that the officers used excessive force in allowing the police dog to continue to bite the plaintiff after he posed no threat. The Ninth Circuit held that the district court correctly denied qualified immunity to the officers because their conduct violated a constitutional right that was clearly established at the time of their alleged misconduct.

Discussion: On September 10, 2019, San Jose police officers responded to a domestic violence call at Zachary Rosenbaum's partner's home. Despite Rosenbaum's compliance after being found, Officer Dunn allowed his canine, Kurt, to continue biting Rosenbaum for an extended period even after he had surrendered, causing severe injuries. The Ninth Circuit concluded that because precedent clearly establishes that allowing a police canine to bite a suspect who has fully surrendered violates the Fourth Amendment, the officers were rightly denied qualified immunity. The officers violated clearly established law by rendering Rosenbaum "obviously helpless" while they restrained him with guns pointed, and delayed 20 seconds before stopping the canine after he appeared to be under control.

EMPLOYMENT CASES

By: Derek Haynes, Porter Scott

Bailey v. San Francisco DistrictAttorney's Office, (S265223) (2024)

Summary: A single racial comment can be actionable as harassment under the Fair Employment and Housing Act (FEHA).

Discussion: Plaintiff, who is African American, worked for the San Francisco District Attorney's Office for fourteen years. She filed suit asserting a variety of claims under the FEHA, including one for racial harassment. The harassment claim was based on a single incident where a co- worker called Plaintiff the N-word in private. The District Attorney's Office filed a Motion for Summary Judgment arguing that single comment did not rise to the level of actionable harassment under the FEHA. The trial court granted the Motion and the Appellate Court affirmed.

Plaintiff appealed the decision to the California Supreme Court, which reversed. The Supreme Court described the question presented as "whether a coworker's one-time use of a racial slur may be actionable in a claim of harassment." To recover on a harassment claim, a plaintiff must prove the harassing conduct was "sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment." The "severe or pervasive" requirement involves a sliding scale. The more severe or serious the harassing conduct, the less pervasive or frequent it needs to be for a plaintiff to recover. The Court explained that the severity of the conduct must be determined "from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff."

The Court analyzed a litany of cases addressing harassing conduct. Those cases have made it clear that "an isolated incident of harassment, if extremely serious, can create a hostile work environment." Courts are still defining the types of isolated incidents that are actionable. Here, the Supreme Court held that a single use of the N-word can certainly be one of them. The Court made a point to note that is true even when used by a non-supervisor. While the harasser's status as a supervisor might be relevant to whether the conduct created a hostile work environment, it is not determinative.

Muldrow v. St. Louis, 144 S.Ct. 967 (2024)

Summary: A job transfer can qualify as an adverse employment action under Title VII even if the transfer does not result in significant harm to the employee.

Discussion: Plaintiff Jatonya Clayborn Muldrow was a Sergeant with the St. Louis Police Department. From 2009 to 2017, she worked as a plainclothes officer in the Department's Specialized Intelligence Division, which granted her FBI credentials and an unmarked take-home vehicle. Upon the request of the new Intelligence Division commander, Plaintiff was transferred
to a uniformed job with the same pay and title, but without the FBI credentials and take-home vehicle.

Plaintiff then filed a Title VII discrimination action against the Department in federal court, claiming she was transferred because she is a woman. The Department filed a Motion for Summary Judgment arguing that a change in terms or conditions of employment must be "significant" to qualify as a discriminatory act. The district court agreed. In granting the Department's Motion, the Court held that Plaintiff did not suffer a significant change in the terms and conditions of her employment because she still had the same title, earned the same pay and benefits and still performed investigative work. The appellate court affirmed that ruling. Plaintiff then appealed to the United States Supreme Court.

The Supreme Court reversed, finding there is no requirement that plaintiffs prove there was a "significant" change in the terms, conditions or privileges of employment. The Court focused on the language of Title VII, which simply states that employees must prove they were discriminated against "with respect to . . . compensation, terms, conditions or privileges of employment." "'Discriminate against' means to treat worse," the Court wrote. There is nothing in the statute indicating that difference in treatment must be significant, serious or substantial "or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar."

In sum, the Supreme Court held that to establish an

EMPLOYMENT CASES

By: Derek Haynes, Porter Scott

adverse employment action under Title VII, plaintiffs must prove they were "worse off" but not "significantly so."

Brown v. City of Inglewood (2023) 92 Cal.App.5th 1256

Summary: Elected officials cannot recover for whistleblower retaliation under Labor Code § 1102.5.

Discussion: Plaintiff was the City of Inglewood's elected treasurer. She filed suit for whistleblower retaliation under Labor Code § 1102.5, alleging that the City unlawfully reduced her pay and duties in retaliation for her reporting financial improprieties.

The City challenged the cause of action via a Special Motion to Strike under the Anti-SLAPP statute. In ruling on that Motion, the trial court analyzed whether Plaintiff had a probability of prevailing on her whistleblower retaliation cause of action. The City argued she could not establish a probability of prevailing because Labor Code § 1102.5 only protects "employees" against retaliation and Plaintiff, as an elected official, does not qualify as an employee. The trial court agreed and granted the City's Motion to Strike. Plaintiff appealed.

In affirming the trial court's ruling, the appellate court looked to Labor Code § 1106, which defines "employee" for purposes of Labor Code § 1102.5 as "any individual employed by . . . any . . . city." There is no reference to elected officials. On the contrary, elected officials are specifically mentioned elsewhere in the Labor Code. Based on that, the Court concluded the Legislature would have mentioned elected officials in Labor Code § 1106 if it intended for them to be included as protected employees. It did not do that. Therefore, the Court held that elected officials are not protected from whistleblower retaliation under Labor Code § 1102.5.

Raines, et al. v. U.S. Healthworks Medical Group, et al. (2023) 15 Cal.5th268

Summary: Business entities that perform personnel-related services for a plaintiff's employer may be directly liable for discrimination under the FEHA even if they do not qualify as the plaintiff's employer.

Discussion: Plaintiffs were offered employment with public agencies conditioned on Plaintiffs passing pre-employment medical screening examinations conducted by Defendant U.S. Healthworks Medical Group ("USHW"), an independent contractor of Plaintiffs' prospective employers. Plaintiffs laterfiled suit claimingUSHW's examinations exceededthe scope permitted under the FEHA, which provides that the examinations must be "job related and consistent with business necessity." Plaintiffs claimed their examinations exceeded that scope because, for example, the questionnaires they were asked to completeinquired into venerealdiseases, problems with menstrual periods, and hair loss.

Plaintiffs filed their lawsuit in state court, but USHW removed it to federal court. The federal district court dismissed the case, finding that only employers can be liable under the FEHA, not contractors of employers like USHW. Plaintiffs appealed to the Ninth Circuit. The Ninth Circuit then asked the California SupremeCourt to resolvethe issue of whether contractors can be directly liable under the FEHA.

The California Supreme Court lookedto the plain meaning of the applicable statute in findingthat business-entity contractors can be directly liable. That statute defines "employers" that may be held directly liable under the FEHA as "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly." Although the statute references "any person acting as an agent,"the Court held that includesbusiness entities actingas agents of the plaintiff's employer.

The Court,however, stopped short of holdingthat all business-entity agents can be directly liable. It limited its opinion to business-entity agents that perform "FEHA-regulated activities" for the plaintiff's employer. The language of the opinion suggests that the Court means to limit this holding to entities performing personnel services, such as medical screenings necessary for employment.

EMPLOYMENT CASES- CONTINUED

By: Derek Haynes, Porter Scott

Martin v. Board of Trustees of the Cal. State University (2023) 97 Cal.App.5th 149

Summary: Statistical evidence showing a disparity in treatment between classes of employees can prove pretext in disparate impact discrimination cases, but only in limited circumstances where the statistics eliminate the possibility of nondiscriminatory reasons for the apparent disparity.

Discussion: Plaintiff Jorge Martin was the former Director of University Communications at California State University, Northridge. Multiple employees filed internal complaints against him alleging discrimination, harassment and retaliation. The University investigated the complaints.
One of those investigations found that he created a hostile work environment. Another found that his conduct did not violate policy, but it did fall below the standard reasonably expected of an employee in Plaintiff's position. The University warned Plaintiff that he needed to cease his improper behavior.

Thereafter, the campus newspaper ran articles regarding Plaintiff's conduct. Employees reported that Plaintiff made comments aboutthose articles and engaged in other relatedconduct that made them uncomfortable and indicatedthat Plaintiff still felt his conduct was acceptable. At that point, the University decided to terminate Plaintiff's employment.

Plaintiff subsequently filed suit alleging discrimination based on race, color, gender and sexual orientation under the FEHA. Plaintiff claimed he was targeted because he is a middle-aged, heterosexual, light-skinned Mexican-American. The University filed a Motion for Summary Judgment, which the trial court granted. Plaintiff appealed.

The Court analyzed the discrimination claim under the McDonnell Douglas burden-shifting approach. Under that approach, the plaintiff has the initial burden to prove a prima facie case of discrimination. The burden then shifts to the employer to offer evidence of a legitimate, nondiscriminatory reason for the alleged discriminatory adverse employment action. The burden then shifts back to the plaintiff to prove the employer's stated reason is pretext for discrimination.

The Court's analysis focused on the last two elements. The Court found that the University satisfied its burden to offer evidence of legitimate reasons for the termination decision based on the findings of the internal investigations. Plaintiff attempted to prove pretext by arguing that the decision-makers did not do enough to verify the truth of the complainants' allegations. The Court rejected that argument, explaining it is not enough to show that decisions could have been subject to further verification. Instead, plaintiffs must prove there were some inconsistencies with the employers' stated reasons for the decisions that infer a discriminatory animus.

Plaintiff also offered statistical evidence in hopes of proving pretext. Specifically, that evidence showed that over the last several years, 14 complaints of discrimination, harassment or retaliation have been sustained against males, resulting in 10 terminations, while only 1 has been sustained against a female and she was not terminated.

The Court held that statistical evidence may be offered to prove discriminatory intent, but the statistics must meet an "exacting standard . . . demonstrate a significant disparity and must eliminate nondiscriminatory reasons for the apparent disparity." The Court found that Plaintiff's statistics did not rise to that level because they were incomplete. He only provided information regarding sustained findings, without offering any information regarding how many complaints were actually filed. Therefore, Plaintiff failed to meet his burden to prove pretext.

Health Freedom Defense Fund, Inc., et al. v. Carvalho, et al., 104 F.4th 715 (9th Cir. 2024)

Summary: An employer's decision to reverse a challenged policy in response to pending litigation does not render the litigation moot.

Discussion: During the height of the pandemic, Defendant Los Angeles Unified School District (District) instituted a policy requiring that employees obtain the COVID-19 vaccine or face termination.

EMPLOYMENT CASES- CONTINUED

By: Derek Haynes, Porter Scott

Two weeks after instituting that policy, Plaintiff Health Freedom Defense Fund, Inc. filed a lawsuit challenging the policy as unlawful. The District responded by immediately amending its policy to allow regular COVID-19 testing as an alternative to mandatory vaccinations. The District then relied on its change in policy to argue that Plaintiff's case was moot. The lower court agreed and dismissed the lawsuit.

However, two weeks later the District reversed its policy to once again mandate vaccines. That led to another lawsuit, this time by multiple interest groups, claiming the mandate violated their substantive due process rights under the Fourteenth Amendment. The focus was on the right to refuse medical treatment.

The District filed a motion for judgment on the pleadings arguing that the vaccination mandate does not violate the Fourteenth Amendment because it was rationally related to a legitimate government interest. The lower court agreed and granted the motion, based primarily on the United States Supreme Court's opinion in Jacobson, from 1905. In Jacobson, the Supreme Court held that mandating the smallpox vaccine was permissible because it was rationally related to the government's legitimate interest in preventing the spread of smallpox, which outweighed the community's interest against mandatory medical care.

Plaintiffs appealed to the Ninth Circuit. While the appeal was pending, the District once again reversed the policy and stopped mandating the vaccine. The District relied on that to argue that the case was moot. The Ninth Circuit rejected that argument based on the voluntary cessation exception to mootness, which provides that an issue is not moot when the only reason it might be moot is because of a change a party makes in response to litigation.

As to the merits, the Ninth Circuit held that the lower court erred in relying on Jacobson. The governmental interest at-issue in Jacobson was the interest in protecting against the spread of smallpox. In the instant case, however, Plaintiffs alleged that the COVID-19 vaccine does not protect against the spread of COVID-19, it just mitigates the symptoms. At the pleadings stage of the litigation, the Court had to accept that allegation as true. Thus, the Jacobson Court's holding that a vaccination mandate is permissible to serve the legitimate interest in protecting against the spread of disease was not controlling given Plaintiffs in the instant action alleged that the COVID- 19 vaccine did not protect against the spread of the virus. Accordingly, the Ninth Circuit vacated the lower court's order and remanded for further proceedings.

Rossi v. Sequoia Union Elementary School (2023) 94 Cal App.5th974

Summary: An employee's refusal to disclose vaccination status is not itself protected medical information that employers are prohibited from considering when making employment decisions.

Discussion: During the COVID-19pandemic, the California State Public HealthOfficer issued an order directing that schools "must verify vaccine status of all workers." Consistent with that direction, Defendant Sequoia Union Elementary School directed all employees to disclose their vaccination status. Plaintiff Gloria Rossi refused. The school offered Plaintiff the opportunity to work from home if she was unwilling to comply, but Plaintiff declined that offer. As a result, the school placed her on unpaid administrative leave before eventually terminating her employment.

Plaintiff then filed suit. There were two cause sof action at-issue. First, Plaintiff alleged the school violated the provision of the Confidentiality of Medical Information Act ("CMIA") that prohibits employers from discriminating against employees who refuse to sign authorizations for the release of their medical information.

The trial court sustained the school's demurrer to that cause of action and Plaintiff appealed. There were two issues on appeal. First, there was a question regarding whether Plaintiff's allegation falls within the anti-discrimination provision of the CMIA. That provision addresses discrimination directed at employees who refuse to sign authorizations for the

EMPLOYMENT CASES- CONTINUED

By: Derek Haynes, Porter Scott

release of their private medical information. The school did not ask Plaintiff to sign an authorization. It asked her to disclose her vaccination status. Plaintiff argued the anti-discrimination provision must nonetheless apply in order to serve the underlying purpose of the provision, which is to protect an employee's right to medical privacy.

The Appellate Court ultimately decided not to resolve that issue because it found the school's demurrer should be sustained on another ground. Specifically, the Court relied on a provision of the CMIA that states "nothing in this section shall prohibit an employer from taking such action as is necessary" when an employee refuses to sign an authorization. The Court found that refusing to let Plaintiff serve as a worker was "necessary" because the Public Health Order explicitly required that the school "verify vaccine status of all workers." Plaintiff refused to let the school verify her vaccination status. Therefore, the only thing the school could do to comply with the Order was not allow Plaintiff to be a "worker."

Plaintiff's Second Cause of Action alleged the school violated the provision of the CMIA that prohibits employers from "using" an employee's "medical information" without a signed authorization. Specifically, Plaintiff claimed the school unlawfully "used" the information to terminate her employment.

The school demurred on two grounds. First, the school argued that it never had any "medical information" that it could use to take action against Plaintiff because she never disclosed her vaccination status. The trial court rejected that argument. It found that by refusing to disclose her vaccination status, Plaintiff effectively disclosed that she was unvaccinated, which constituted medical information that the school was prohibited from using.

Second, the school argued that its actions were authorized based on a provision of the CMIA which states that employers may disclose medical information "if the disclosure is compelled by judicial or administrative process or by any other specific provision of the law." The school claimed its actions were "compelled" by the Public Health Order. The trial court agreed and sustained the school's Demurrer on that ground. Plaintiff appealed.

The Appellate Court ultimately upheld the trial court's decision to sustain the Demurrer, but on different grounds. It disagreed with the trial court's conclusion that the school's actions were authorized based on the CMIA provision that allows disclosure "if the disclosure is compelled by judicial or administrative process or by any other specific provision of the law." The Court noted that provision only authorizes the "disclosure" of medical information, not the "use" of that information. Plaintiff's allegation was that the school "used" the information to terminate her, not that it disclosed the information.

The Appellate Court, however, agreed with the first argument the school raised on its Demurrer, that it never had any "medical information" regarding Plaintiff and, therefore, could not have taken any action against Plaintiff based on medical information. The Appellate Court rejected the trial court's conclusion that Plaintiff's refusal to disclose her vaccination status was "effectively" a disclosure that she was not vaccinated, which constitutes protected medical information.

The Appellate Court held that protected medical information is limited to information that is in the possession of or derived from a healthcare provider that relates to a patient's medical history, condition or treatment. Plaintiff's refusal to disclose her vaccination status did not rise to that level. Therefore, the school had no "medical information" upon which it could have acted in violation of the CMIA.

Paleny v. Fireplace Products U.S., Inc. (2024) 103 Cal App.5th199

Summary: The Court found that plaintiffs are not protected under the FEHA as "pregnant" or "disabled" while participating in reproductive health services, but the Legislature has since adopted new statutes that do provide protections.

Discussion: Plaintiff Erika Paleny was employed by Defendant Fireplace Products as an administrative assistant. In November2018, she advisedher supervisor that she was going through egg retrieval

EMPLOYMENT CASES- CONTINUED

By: Derek Haynes, Porter Scott

procedures for fertility treatment. Plaintiff claims her supervisor disapproved of the procedures and made comments to that effect. Then, Plaintiff's supervisor allegedly terminated Plaintiff for requesting time off for the procedures.

Plaintiff filedsuit claiming disability-based and pregnancy-based discrimination in violation of the FEHA. Defendant ultimately filed a Motion for Summary Judgment arguing that Plaintiff could not prevail because she was technically neither disabled nor pregnant. The trial court granted that Motion. Plaintiff appealed.

In affirming the trial court's ruling, the Appellate Court relied on strict statutory construction. The FEHA prohibits discrimination based on "pregnancy" and "disability." However, Plaintiff was not pregnant. She was only going through fertility treatment. Plaintiff also failed to provide any evidence that she had some kind of disability. Therefore, according to the Appellate Court, she could not prevail on either cause of action.

Employers should not rely on this opinion, however. The Legislature has since enacted the Contraceptive Equity Act, which expands the FEHA to also protect the use of medical services for reproductive health purposes. Employers should update their policies and practices to reflect that change.

Hittle v. City of Stockton, 101 F.4th 1000 (9th Cir. 2023)

Summary: Terminating an employee for religion-based conduct does not necessarily amount to unlawful discrimination when that conduct also violates other, legitimate employment policies. The Court also noted that a supervisor's decision to repeat religion-based comments to Plaintiff that were made by other employees was not evidence of discriminatory animus because the supervisor did so for the legitimate purpose of advising Plaintiff of how he is perceived by others.

Discussion: Plaintiff Ronald Hittle was the Fire Chief for the City of Stockton. The City hired an outside investigator to investigate allegations of misconduct, including reports that Plaintiff was a member of a Christian coalition and that he favored employees who shared his Christian faith. The investigation confirmed that Plaintiff engaged in a litany of misbehaviors. He used City time and a City vehicle to attend a religious event, he approved other employees to attend the event while on duty, he was not an effective leader, he showed favoritism to certain employees, and he violated various conflict-of-interest rules.

The City sent Plaintiff a Notice outlining those findings and advising that he was terminated based on them. Plaintiff then filed suit for discrimination under the FEHA and Title VII, claiming his religion motivated the termination decision. The City filed a Motion for Summary Judgment, which the trial court granted. Plaintiff appealed. The Appellate Court affirmed the trial court's ruling.

The issue on appeal was whether Plaintiff offered sufficient evidence indicating that his religion motivated the termination decision. Plaintiff cited communications from the City that referenced him being a member of a "Christian coalition," but the Court found the City was merely repeating the phrase used in the complaints made against Plaintiff and in the investigation report. The Court noted that repeating another person's pejorative term is not evidence of discriminatory animus when done for the purpose of communicating concerns about how other people perceive the plaintiff.

Plaintiff also cited the fact that the City repeatedly referred to him as attending a "religious event" in disciplinary communications. However, the Court found the City did so for the legitimate purpose of pointing out that Plaintiff improperly attended the religious event while on duty.

Plaintiff also cited conversations where City representatives warned him that the City could not favor one religion over another. The Court found those comments were not evidence of discrimination, but rather comments expressing legitimate, non- discriminatory concerns about Plaintiff's conduct.

Overall, the Court was swayed heavily by the fact

EMPLOYMENT CASES- CONTINUED

By: Derek Haynes, Porter Scott

that the City had strong evidence of Plaintiff's misconduct. Just because some of that misconduct related to religious activities, does not mean the City targeted Plaintiff because of his religion.

Cruz v. City of Merced(2023) 95 Cal.App.5th 453

Summary: In an employment action, the collateral estoppel doctrine does not preclude an employee-officer from relitigating the issue of whether the officer lied under oath even though a criminal court already ruled that he did. A finding that a law enforcement officer lied under oath might not be enough to justify termination.

Discussion: Plaintiff Jose Cruz was a police officer with the City of Merced. On September 18, 2018, he testified in a criminalproceeding regarding a search he conducted that led to him finding a suspect's gun. The judge in the criminal proceedings found the search was unlawful and that Plaintiff lied when testifying about the events of the search.

The City decided to terminate Plaintiff's employment for, amongst other things, conducting an illegal search, lying under oath when he testified about that search, and filing a false police report about the search. Plaintiff filed a Petition for Writ of Administrative Mandamus challenging the decision. He argued that the City lacked substantial evidence to support the findings of misconduct. The trial court ruled in the City's favor and Plaintiff appealed.

The appeal addressed several issues. The most relevant issue relates to application of the collateral estoppel doctrine. The trial court held that doctrine precluded Plaintiff from re-litigating whether his search was legal and whether he lied under oath given that the criminal court already decided both issues.

The Appellate Court reversed that conclusion. In doing so, the Court explained that the collateral estoppel doctrine only applies when the parties in both proceedings are in "privity." Privity only exists if the parties in the original proceeding and the subsequent proceeding have identical or sufficiently similar interests to justify binding the parties in the subsequent proceeding. Although the legality of Plaintiff's search and his credibility were of interest in the criminal proceeding and the writ proceeding, they were not the primary interests. The District Attorney's primary interest in the criminal proceeding was prosecuting a criminal defendant, while the primary interest in the employment action was Plaintiff's continued employment. The Appellate Court found those interests were not sufficiently similar to justify application of collateral estoppel.

The Appellate Court then went on to evaluate whether the evidence presented in the writ proceedings was sufficient to prove Plaintiff's misconduct, absent application of the collateral estoppel doctrine. The Court found there was insufficient evidence that Plaintiff's search was illegal, but there was sufficient evidence to prove that he lied when he testified about the search.
The Court concluded this alone may not be enough to justify Plaintiff's termination.

DANGEROUS CONDITION, IMMUNITIES AND AFFIRMATIVE DEFENSES, CLAIM PRESENTATION, AND MUNICIPAL GOVERNMENT ADMINSITRATION CASES

By: Dana Quinn, Maria Nozzolino, Nico D. Syren, Mark F. Hazelwood, and Matthew T. Matejcek of Allen, Glaessner, Hazelwood & Werth LLP

DANGEROUS CONDITION

Miller v. Pacific Gas & Electric Co., et al., (November 27, 2023) 97 Cal.App.5th 1161

Summary: A pedestrian tripped over a vertical misalignment of less than one inch between a metal plate covering an underground utility vault owned by Pacific Gas & Electric Company ("PG&E") and the sidewalk adjacent to property owned by Hip Ben Benevolent Association causing her to fall and hurt her ankle. The First District Court of Appeal affirmed summary judgment for defendants upholding the trivial defect doctrine.

Discussion: Plaintiff, Crista Miller, was walking down Washington Street in San Francisco when she tripped on a vertical misalignment between a metal plate covering an underground utility vault and the adjacent sidewalk. The metal plate covering the utility vault was made of ordinary, diamond-plated metal. The sidewalk was wet because it had drizzled earlier, and the night sky was dark, misty and foggy. The parties agreed that the height differential between the sidewalk edge and metal plate was less than one inch. Plaintiff alleged she failed to see the half inch misalignment because she was walking downhill.

At the time of the incident, the City's Department of Public Works had guidelines in place concerning the repair of sidewalk defects to improve accessibility in the area. Priority repairs included sidewalk defects of vertical displacements of a half inch or more. The City found no complaints or service requests concerning the utility vault, the metal plate or the sidewalk location or any reports of any previous trip and fall accidents at or near the incident location in the nine years before the incident occurred. The adjacent property owner was also not aware of any prior trip and fall incidents having occurred on the sidewalk adjacent to his property. After Plaintiff's fall, a City inspector evaluated the incident location and issued repair notices and orders requiring defendants PG&E and the adjacent property owner to repair the vertical misalignment of the sidewalk and the metal plate cover.

The Court of Appeal used a two-step analysis to determine whether the sidewalk defect was trivial and nonactionable. First, the Court reviewed the evidence of the size and nature of the defect. Finding the defect to be trivial based on its physical characteristics, the Court then looked at whether the defect, despite being trivial, was likely to post a significant risk of injury because of conditions of the walkway surrounding the defect or any other circumstance involved in the subject accident.

The Court rejected Plaintiff's argument that the City's guidelines to repair sidewalk height differentials one-half inch or greater created a disputed fact concerning whether the defect was dangerous because Plaintiff presented no evidence that the City's standard for repair of sidewalk defects was accepted as the proper standard in California for safe sidewalks. The Court also rejected Plaintiff's argument that the misalignment was a dangerous condition that would put a reasonably careful person at risk of injury because of either the steep downgrade of the street, the weather and nighttime hour, or the crowds on the street.

Based on the evidence, the Court of Appeal concluded that the vertical misalignment of the metal plate and adjacent sidewalk was a trivial defect as a matter of law because the size of the defect was less than one half inch, the defect was illuminated by multiple sources of street and business lighting, no debris concealed the defect and there were no prior tripping incidents at the subject location.

Summerfield v. City of Inglewood (October 25, 2023) 96 Cal.App.5th 983

Summary: Plaintiffs brought a wrongful death action against the City of Inglewood after their son was shot and killed by an unknown third party in a City park. Plaintiffs alleged the City created a dangerous condition by failing to install security cameras in an area with known ongoing criminal activity. The

DANGEROUS CONDITION, IMMUNITIES AND AFFIRMATIVE DEFENSES, CLAIM PRESENTATION, AND MUNICIPAL GOVERNMENT ADMINSITRATION CASES- CONTINUED

By: Dana Quinn, Maria Nozzolino, Nico D. Syren, Mark F. Hazelwood, and Matthew T. Matejcek of Allen, Glaessner, Hazelwood & Werth LLP

Second District Court of Appeal sustained the lower court's ruling granting the City's demurrer finding there were insufficient pleading allegations as to Plaintiffs' claim for dangerous condition.

Discussion: On January 5, 2021, Andrew Summerfield went to Darby Park in Inglewood to play basketball. Andrew was shot and killed by an unknown third party while sitting in his car in the parking lot. Andrew's parents and his estate filed a complaint against the City alleging dangerous condition of public property and general negligence. The complaint alleged Darby Park was owned and maintained by the City and that there had been previous shootings at the park prior to the subject incident. The complaint further alleged that the gym at Darby Park was open to the public on the day of the shooting in violation of the City's COVID-19 protocol which was a substantial factor in drawing multiple people to the park. After the lower court sustained the City's demurrer as to the original complaint, the amended complaint added the allegations that there were no cameras in the parking lot and a lack of any other adequate protections such as attendants, control measures and security guards. The amended complaint argued that there were at least two previous shootings at the park and the lack of cameras presented attractive opportunities for criminal activities and created a dangerous condition of property, of which the City had actual or constructive knowledge.

In reviewing the allegations of the operative first amended complaint, the Court of Appeal affirmed the trial court's decision granting the City's demurrer without leave to amend. The Court found the presence or absence of security guards was not a physical characteristic of property and thus the allegations were not actionable as a dangerous condition of public property claim. The Court further found allegations of prior shootings and allegations of inadequate security (such as the lack of security cameras in the parking lot) did not support a claim for dangerous condition or establish either actual or constructive notice of a dangerous condition. Specifically, the Court pointed out that allegations of two prior shootings, one of which did not take place in the parking lot, did not constitute "ongoing" criminal activity. Finally, the Court found the complaint allegations were insufficient to find the City failed to provide a warning of any actionable dangerous condition. As to the general negligence cause of action, the Court dismissed the claim as non-statutory and noted the allegations of negligence were predicated on the same grounds as the dangerous condition claim.

IMMUNITIES & AFFIRMATIVE DEFENSES

Stufkosky v. California Dept. of Transportation (2023) 97 Cal.App.5th 492

Summary: Plaintiffs Kierra and Merek Stufkosky, sued the California Department of Transportation ("Caltrans") for dangerous condition of public property after their father died in a car accident on State Route 154 (SR-154). Plaintiffs argued the portion of SR-154 where the accident occurred constituted a dangerous condition because Caltrans failed to adequately warn motorists of frequent deer crossing. The Court of Appeal for the Second District upheld summary judgment for Caltrans based on the affirmative defense of design immunity.

Discussion: A motorist struck a deer while driving westbound on SR-154 near Santa Ynez, California. The impact sent the deer into the eastbound lane where it struck an oncoming SUV. The SUV lost control, veered across the centerline, and collided head on with a westbound car driven by Jorgen Stufkosky. Stufkosky died of his injuries as a result of the accident.

Plaintiffs brought a wrongful death action against Caltrans premised on a dangerous condition claim under Government Code section 835. Caltrans moved for summary judgment asserting the affirmative defense of design immunity under Government Code section 830.6. Caltrans argued it met all three elements of design immunity – (1) causal connection between plan and accident; (2)

DANGEROUS CONDITION, IMMUNITIES AND AFFIRMATIVE DEFENSES, CLAIM PRESENTATION, AND MUNICIPAL GOVERNMENT ADMINSITRATION CASES- CONTINUED

By: Dana Quinn, Maria Nozzolino, Nico D. Syren, Mark F. Hazelwood, and Matthew T. Matejcek of Allen, Glaessner, Hazelwood & Werth LLP

discretionary approval of the design; and (3) reasonableness of the design.

Plaintiffs contended Caltrans could not establish a causal relationship between SR-154's design and the accident because Caltrans did not produce evidence that it "expressly considered" the design alternatives Plaintiffs argued would have prevented the accident (i.e., such as lowering the speed limit, placing more deer crossing signs and installing median barriers.) The Court rejected Plaintiffs' argument on this first element of design immunity finding the evidence they cited was immaterial because the complaint clearly alleged Caltrans was aware of deer entering the roadway and failed to safeguard motorists. The Court found the pleading allegations were enough to establish the required causal connection.

As for the second element of design immunity, discretionary approval of the plan or design, Caltrans produced detailed plans of the relevant stretch of highway and established (1) the design was approved in advance by its board exercising discretionary authority and (2) the design was prepared in conformity with standards previously approved by the agency. Plaintiffs again argued Caltrans failed to meet this element for the same reason it argued Caltrans could not establish a causal relationship – because Caltrans did not consider certain additional safety features Plaintiffs argued would have prevented the accident. Plaintiffs contended the decision not to include a feature in a project is shielded from design immunity only if the public entity expressly considered the feature in advance of their ultimate decision. The Court rejected this interpretation of the second element of design immunity and emphasized Plaintiffs were misinterpreting what Caltrans actually had to show to meet their burden. The Court pointed out advance approval meant only approval in advance of construction by the legislative body or officer exercising discretionary authority. A detailed plan is enough to satisfy the element. A traffic engineer for Caltrans attested to the applicable design standards and how Caltrans addressed the dangers posed by deer entering the traffic and vehicles crossing the median. The Court concluded that this constituted substantial evidence of advance approval. The Court rejected the notion that it should second-guess the decision of Caltrans to include or omit certain design features. The Court emphasized that a public entity is not required to address all conceivable design features during the approval process.

Finally, as to the third element of design immunity, reasonableness of the plan or design, Plaintiffs contended the trial court did not address their separate and independent allegation that Caltrans created a dangerous condition when it failed to adequately warn drivers of deer crossings. Plaintiffs cited the California Supreme Court's earlier ruling in Tansavatdiv. City of Rancho Palos Verde (2023) 14 Cal.5th 639 in support of this argument. The Court of Appeal disagreed finding (1) Tansavatdi held only that design immunity did not shield a city for liability for a "concealed trap" [i.e., design immunity "does not permit it [the public entity] to remain silent when it has notice that an element of the road design presented a concealed danger to the public"] and (2) the California Supreme Court in Tansavatdi specifically declined to decide the very issue presented in Stufkosky: whether design immunity affected a failure to warn claim when the public entity does produce evidence that it considered whether to provide a warning. Here, Caltrans produced evidence that its design plans specified the quantity and placement of deer crossing signs. Importantly, the Court noted six deer warning signs appeared long the 15-mile segment of the highway where the accident took place. Plaintiffs did not dispute Caltrans warned motorists of this danger, only that Caltrans did not do so adequately. The Court rejected this argument.

In summary, the Court found failure to warn was not an independent theory from design immunity because Caltrans could show it considered and incorporated warning of the alleged dangerous condition in the design plans.

DANGEROUS CONDITION, IMMUNITIES AND AFFIRMATIVE DEFENSES, CLAIM PRESENTATION, AND MUNICIPAL GOVERNMENT ADMINSITRATION CASES- CONTINUED

By: Dana Quinn, Maria Nozzolino, Nico D. Syren, Mark F. Hazelwood, and Matthew T. Matejcek of Allen, Glaessner, Hazelwood & Werth LLP

Helm vs. City of Los Angeles (2024) 101 Cal.App.5th 1219

Summary: Plaintiff, Brady Helm, tripped and fell on a wire cable while walking to a recreational area next to Diaz Lake in Owens Valley, Inyo County, California. The wire cable was suspended between two wooden poles and was intended to prevent vehicles from accessing a pedestrian pathway. Plaintiff brought suit against, among others, the County of Inyo and the City of Los Angeles alleging a dangerous condition of public property. The County and the City prevailed on summary judgment, arguing that Plaintiff tripped while walking along a trail, and thus, they were immune under Government Code section 831.4.

Discussion: The City owns Diaz Lake, but the County maintains the lake as well as a surrounding campground. In 2015, the County installed numerous 18 to 24 inch discarded wooden telephone posts around Diaz Lake to create a defined barrier between the area for vehicular traffic and the pedestrian trails that lead down to the lake. Visitors to Diaz Lake could camp in designated areas or utilize the day-use area. The day-use area has a beach and is used for fishing, hiking, swimming, picnicking, and other recreational activities. The wooden posts, most of which were placed about two feet from each other, served the purpose of preventing unauthorized vehicle traffic venturing into non-designated areas, including near the shore of the lake. However, the wooden posts were not installed to prevent foot traffic from accessing the lake as people could easily walk around them. At a certain section of the road, two posts were somewhat further apart, separated by about 8 to 10 feet, but spanned by a wire cable that could be unlocked by park personnel when they needed to drive a vehicle down to the lake shore for maintenance or repair activities. To access the day-use area, there is a defined walking trail that leads from the parking lot area to the water's edge. People could use that trail to access the available recreational activities.

On July 3, 2020, Plaintiff stopped at the day-use area of the lake so his dogs could go for a swim in the lake. He parked his vehicle on the unpaved road about six to eight feet away from the wooden posts and cable. Plaintiff argued there existed at least one pathway that led down towards the beach area and water. The pathway had two wooden posts with a wire cable suspended between them. Plaintiff described the pathway as defined and well-worn. As Plaintiff walked toward the wooden posts and cable, he saw the posts in the ground, but did not see the cable between them. Plaintiff was looking at the lake and not the ground when he approached the wooden posts and cable. Once he reached the posts and cable, he felt the cable limit his ability to raise his left foot, and with his right foot trailing behind, he fell to the ground and was injured.

The lower court granted summary judgment in the County and City's favor finding they were immune from liability based on trail immunity under Government Code section 831.4. On appeal, Plaintiff argued there was a disputed material fact as to whether he tripped while walking on a trail. He further argued the wood posts and wire cable were not an integral feature of any trail.

The Court of Appeal started by noting that the recreational trail immunity statute provides that a public entity is not liable for an injury caused by a condition of the following: (a) any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas; or (b) any trail used for the above purposes. The Court noted subdivisions (a) and (b) should be read together such that immunity attaches to trails providing access to recreational activities as well as to trails on which those recreational activities take place.

Whether a property is considered a "trail" under Section 831.4 turns on a number of considerations, including (1) the accepted definitions of the property, (2) the purpose for which the property is

DANGEROUS CONDITION, IMMUNITIES AND AFFIRMATIVE DEFENSES, CLAIM PRESENTATION, AND MUNICIPAL GOVERNMENT ADMINSITRATION CASES- CONTINUED

By: Dana Quinn, Maria Nozzolino, Nico D. Syren, Mark F. Hazelwood, and Matthew T. Matejcek of Allen, Glaessner, Hazelwood & Werth LLP

designed and used, and (3) the purpose of the immunity statute. In reviewing the evidence before the lower court, the Court of Appeal noted Plaintiff referred to the area at deposition as a "pathway" and a "trail." Moreover, Plaintiff described the pathway as defined, pronounced, not overgrown with weeds, and clearly utilized by others. As such, the Court found the only reasonable interpretation was Plaintiff was attempting to utilize a trail down that went down to the beach when he did not see the cable and fell. As to the second element, the Court found there could be no factual dispute that it was satisfied because the evidence conclusively established that the pathway was designed for recreational use. After all, Plaintiff himself testified he intended to take the pathway to the beach.

Having determined that Plaintiff was injured while accessing a trail, the Court next considered whether the wooden poles and wire cable were integral parts of that trail. The Court found that they were. The undisputed evidence was that the purpose of the wooden poles and the cable was to prevent vehicles using the pathway to access the lake. There was no intention for those same poles and cable to prohibit people from using the pathway to access the lake. Thus, it was integral part of the trail for pedestrian access.

Carr v. City of Newport Beach (2023) 94 Cal.App.5th 1199

Summary: Plaintiff, who sustained injuries after diving headfirst into shallow waters, from a 20-inch-wide seawall, brought an action for dangerous condition of public property and failure to warn against the City of Newport Beach. The Fourth District Court of Appeal sustained the trial court's granting of summary judgment based on hazardous recreational activity immunity.

Discussion: Plaintiff, Brian Carr, and a friend were kayaking in Newport Bay. After consuming a few beers, they returned to a beach known as "Baby Beach." Plaintiff chose to dive headfirst into the harbor waters from a 20-inch wide seawall, which was originally constructed in the 1930s for erosion control. Plaintiff hit the bottom of the shallow water, sustaining a spinal cord injury. Plaintiff filed suit against the City of Newport Beach alleging two primary causes of action: Dangerous condition of public property under Government Code section 835; and failure to warn under Government Code section 830.8.

The trial court granted summary judgment in favor of the City, concluding that hazardous recreational activity immunity applied and that there were no triable issues of fact regarding gross negligence. Plaintiff appealed.

Government Code section 831.7 provides immunity to public entities for injuries sustained during hazardous recreational activities, such as diving into water from any place other than a diving board or platform, or where diving is prohibited with reasonable warning. Plaintiff argued that this immunity only applied where warnings were given. The Court disagreed noting that the statue is written in the disjunctive, meaning diving from places other than diving boards or platforms triggers immunity regardless of warnings. The Court further found that because the seawall was not a diving board, but rather was built to control erosion, diving from the seawall fell within the scope of a hazardous recreational activity.

The exception to hazardous recreational activity immunity applies to when a public entity is found to be grossly negligent. Plaintiff contended that this exception applied because the City was grossly negligent for not blocking access to the seawall or posting warnings, despite training lifeguards about the dangers of diving from such structures. The Court rejected this argument, finding that most facts Plaintiff relied on were not pleaded in the complaint and that the seawall did not pose an extreme risk. The inherent risk of diving into water is hitting the bottom, which is an assumed risk in hazardous recreational activities. The Court noted gross negligence does not lie in failing to protect against or warn about inherent risks.

DANGEROUS CONDITION, IMMUNITIES AND AFFIRMATIVE DEFENSES, CLAIM PRESENTATION, AND MUNICIPAL GOVERNMENT ADMINSITRATION CASES- CONTINUED

By: Dana Quinn, Maria Nozzolino, Nico D. Syren, Mark F. Hazelwood, and Matthew T. Matejcek of Allen, Glaessner, Hazelwood & Werth LLP

The Court affirmed judgment in favor of the City, emphasizing the legislative intent to shield public entities from liability to promote the use of public lands for recreational activities.

Danielson v. County of Humboldt (2024) 103 Cal. App. 5th 1

Summary: Plaintiff brought an action for failure to discharge mandatory duties under Government Code section 815.6 regarding dangerous and unvaccinated dogs under state law and local ordinances against the County of Humboldt after he was attacked by two pit bulls. The lower court granted the County's demurrer without leave to amend finding the cited state law and ordinances did not impose a mandatory duty.

Discussion: Plaintiff Candis Danielson was on property owned by Donald Mehrtens when she was attacked and mauled by Mehrtens' two pit bulls, Sissy and Huss. As a result of the incident, Plaintiff reportedly suffered wound infections, posttraumatic stress disorder, and emotional distress. Mahrtens allegedly told Plaintiff that Sissy was the primary aggressor, and Huss just followed Sissy's lead. Mehrtens surrendered both dogs to Humboldt County. The County held a hearing to determine whether they were vicious or dangerous. Both dogs were euthanized and Mehrtens was barred from owning dogs for three years.

With respect to the mandatory duty claim, the operative first amended complaint alleged the County had a number of prior contacts with Mehrtens involving dogs, including previously dispatching animal control officers to Mehrtens' address. The operative complaint further alleged Mehrtens had previously been cited by the County for dogs being at large, unvaccinated, and unlicensed. The complaint also alleged Sissy had previously been quarantined by the County for biting a neighbor. Sissy was unvaccinated and unlicensed at the time of the report.

The County demurred to the first amended complaint on the grounds that the allegations against the County failed to allege sufficient facts to state a cause of action in several respects. The County argued that the allegations were insufficient to support causation and that the dangerous dog statutes cited by Plaintiff were not designed to protect against the particular kind of injury alleged by Plaintiff. Plaintiff, meanwhile, requested the trial court take judicial notice of Humboldt County's status as a designated rabies area and argued the Humboldt County animal control officer who responded to Sissy's previous dog bite incident had a mandatory duty under local ordinance to petition the Humboldt County Animal Control Director for a hearing at that time to determine whether Sissy was potentially dangerous or a nuisance. Plaintiff further alleged that the County had a mandatory duty to impound Sissy under state vaccination statutes and local ordinance.

The Court of Appeal disagreed with Plaintiff finding neither the Humboldt County Code nor the California Health and Safety Code (the two statutes relied on by Plaintiff in alleging a mandatory duty to vaccinate and impound Sissy at the time of the previous bite) imposed a mandatory duty. Notably, the Court explained that an enactment requiring a public entity to conduct an investigation under certain circumstances (here the Humboldt County Code requiring a dangerous dog hearing) does not, without more, impose a mandatory duty to take a certain specified action. Thus, the Court reasoned, the requirement of the dangerous dog hearing did not impose a duty to euthanize a dog. The Court rejected then Plaintiff's causation argument that in failing to conduct the hearing, the dog was not euthanized, and allowed to attack and maul her. The Court also found no mandatory duty to impound a dog for failure to vaccinate or license in the Humboldt Code. Using the plain language of the statute, the Court reasoned that the section of the Health and Safety Code cited to by Plaintiff did not use "shall" and as such did not use "explicit and forceful language" required for finding a mandatory duty. The Court further noted the failure to vaccinate or license the dogs was not a cause in fact of

DANGEROUS CONDITION, IMMUNITIES AND AFFIRMATIVE DEFENSES, CLAIM PRESENTATION, AND MUNICIPAL GOVERNMENT ADMINSITRATION CASES- CONTINUED

By: Dana Quinn, Maria Nozzolino, Nico D. Syren, Mark F. Hazelwood, and Matthew T. Matejcek of Allen, Glaessner, Hazelwood & Werth LLP

Plaintiff's alleged injuries.

Finding the cited statutes neither imposed a mandatory duty, nor were intended to prevent the type of injury pleaded by Plaintiff, the Court affirmed summary judgment.

Whitehead v. City of Oakland (2024) 99 Cal. App. 5th 775

Summary: Plaintiff sued the City of Oakland for dangerous condition of public property after his bicycle hit a pothole during a training ride for the AIDS Life Cycle fundraiser. Prior to the training ride, Plaintiff signed an agreement releasing the "owners/lessors of the course or facilities used in the event" from future liability. The First District Court of Appeal affirmed summary judgment concluding the release was enforceable.

Discussion: In March 2017, Plaintiff, Ty Whitehead, participated in a group training ride for AIDS Life Cycle, a multi-day group bicycle ride fundraiser from San Francisco to Los Angeles. During the ride, Plaintiff —an experienced cyclist and a certified training ride leader himself (though not the leader for this particular ride)—hit a pothole that was approximately one to two inches deep, 18 inches across, and 14 inches long. Plaintiff flipped over his bicycle handlebars and hit his head on the pavement.

Prior to but on the same day as the training ride, Plaintiff signed a document entitled "AIDS/Life Cycle Training Ride GENERAL INFORMATION AND RELEASE AND WAIVER OF LIABILITY, ASSUMPTION OF RISK, AND INDEMNITY AGREEMENT" ("The Release"). The Release contained an assumption of risk provision and a waiver and release provision related to liabilities and damages.

Plaintiff filed suit against the City of Oakland alleging the City failed to maintain and repair Skyline Boulevard and that the location of the accident was in a dangerous condition due to the pothole that his bicycle hit. The complaint alleged dangerous condition of public property pursuant to Government Code, section 835 and vicarious liability for the negligent act or omission of a public employee under Government Code section 815.2.

The trial court granted the City's motion for summary judgment on the grounds that Plaintiff's execution of the Release barred his claim for liability arising from a dangerous condition of public property.

In upholding the lower court's decision, the Court of Appeal relied on prior decisions that had concluded categorically that private agreements made "in the recreational sports context" and releasing liability for future ordinary negligence did not implicate the public interest and therefore were not void as against public policy. The Court found Appellant executed the Release in exchange for entry into a recreational cycling activity that was organized for fundraising purposes. As such, the Court found it valid and enforceable because the cycling event was a nonessential sports activity that did not affect the public interest within the meaning of Civil Code section 1668.

While the Court noted the Release could not relieve the City of acts of gross negligence by its employees, the evidence did not support such a finding. Plaintiff argued the evidence showed a City employee suspected underreporting of data concerning falls or collisions of bicycles at the subject area based only on his personal observations. The Court deemed such evidence immaterial to the issue of gross negligence. The Court further noted such speculative evidence did not create a triable issue as to whether the City's conduct marked an extreme departure from the ordinary standard of care, whether the City substantially or unreasonably increased the inherent risk of an activity or whether the City concealed a known risk.

Altizer v. Coachella Valley Conservation Commission (2023) 94 Cal. App. 5th 749

Summary: Plaintiff ran into a suspended cable fence while riding his off-road motorcycle on an unpaved

DANGEROUS CONDITION, IMMUNITIES AND AFFIRMATIVE DEFENSES, CLAIM PRESENTATION, AND MUNICIPAL GOVERNMENT ADMINSITRATION CASES- CONTINUED

By: Dana Quinn, Maria Nozzolino, Nico D. Syren, Mark F. Hazelwood, and Matthew T. Matejcek of Allen, Glaessner, Hazelwood & Werth LLP

area within property owned by defendant Coachella Valley Conservation Commission, a public entity. Plaintiff sustained serious injuries. Plaintiff filed suit alleging that the cable fence created a dangerous condition of public property. The trial court granted summary judgment for the Commission. Upon review, the Fourth District Court of Appeal affirmed judgment, finding that the Commission was entitled to hazardous recreational activity immunity under Government Code section 831.7.

Discussion: On June 1, 2018, Plaintiff Tanner Altizer was riding his Suzuki 250 motorcycle within property owned by the Coachella Valley Conservation Commission ("Commission"). The subject property was a 160-acre piece of unoccupied desert land in Desert Hot Springs. The property consisted of several parcels between residential areas. Plaintiff was riding to his sister's home, when he decided to use an unpaved trail that was part of the Commission property. In 2014, the Commission decided to fence off the perimeter of the property because of vehicular traffic and illegal trash dumping. As Plaintiff proceeded along the trail, he did not see a cable fence until he was too close to stop. He crashed into the fence and sustained serious injuries.

Plaintiff sued the Commission alleging the creation of a dangerous condition under Government Code § 835. The Commission moved for summary judgment on several grounds, including hazardous recreational immunity under Government Code section 831.7. The trial court granted summary judgment and Plaintiff appealed.

Section 831.7 precludes imposing liability on a public entity for injuries "'arising out of" hazardous recreational activities conducted on public property." The parties disputed whether Plaintiff was engaging in a hazardous recreational activity at the time of the accident. Plaintiff contended that he was not engaged in a recreational activity at the time of the accident. Rather, he argued that he was traveling across the Commission's property to his sister's house to avoid traffic, not for a recreational purpose. The Commission directed the court to Section 831.7(b), which sets forth a non-exclusive list of hazardous recreational activities, which includes "off road motorcycling… of any kind."

The Court of Appeal agreed with the Commission. The court held that the broad language of Section 831.7(b) covered off-road motorcycling of any kind, regardless of purpose. This included Plaintiff riding the off-road motorcycle on an unpaved, dirt road on the Commission's property when he collided with the cable fence.

Plaintiff also argued that the Commission was not entitled to immunity under Section 831.7, because of the failure to warn exception under Section 831.7(c)(1). The Court again sided with the Commission and held that the failure to warn exception did not apply, because the cable fence was open and obvious and objectively did not pose a substantial risk of danger to any member of the general public using due care. Given the desert area, and the fact that properties are fenced off, the court held that Plaintiff, at a minimum, should have been alert to such conditions. Given this broad interpretation of Section 831.7, judgment was affirmed.

CLAIM PRESENTATION

A.S., a Minor, v. Palmdale School District (2023) 94 Cal. App. 5th 1091

Summary: Plaintiff, a minor, alleged that an elementary school teacher grabbed and twisted his arm causing personal injuries. Plaintiff's mother filed a complaint form with the Palmdale School District on her son's behalf. Plaintiff's mother sought a full and unbiased investigation into the incident. Subsequently, Plaintiff, represented by counsel, filed a complaint for damages against the District and others. The trial court sustained the District's demurrer, concluding that Plaintiff failed to present a timely Government Tort Claim, a prerequisite to suit, in compliance with Government Code section 910.2. The Second Appellate District affirmed.

DANGEROUS CONDITION, IMMUNITIES AND AFFIRMATIVE DEFENSES, CLAIM PRESENTATION, AND MUNICIPAL GOVERNMENT ADMINSITRATION CASES- CONTINUED

By: Dana Quinn, Maria Nozzolino, Nico D. Syren, Mark F. Hazelwood, and Matthew T. Matejcek of Allen, Glaessner, Hazelwood & Werth LLP

Discussion: On March 5, 2019, a Palmdale School District elementary school teacher allegedly grabbed Plaintiff's arm and twisted it, resulting in an injury, requiring medical treatment. The next day, Plaintiff's mother sought to file a complaint. She was given a "complaint form," which she filled out. Plaintiff asked District staff if there were any other forms to complete, and she was told there were none and that a full inquiry would be made into the incident.

On February 25, 2020, Plaintiff, now represented by counsel, and acting through his mother as guardian ad litem, filed a lawsuit against the District and others seeking monetary damages. He alleged that he had complied with the requirements of the Government Claims Act (section 810 et seq.) ("Claims Act") and attached a copy of the complaint form his mother had earlier completed. The District demurred to the complaint, alleging non-compliance with the Claims Act. The trial court sustained the demurrer without leave to amend.

On appeal, the Court of Appeal reiterated established law that the Claims Act requires a person seeking monetary damages from a public entity to file a claim with that entity (Section 905). The claim must include the information specified in Section 910. This includes the amount claimed if it is less than $10,000 and/or whether the case would be a limited jurisdiction case. The Court noted that a claim under Section 910 is sufficient if there is: 1.) some compliance with all of the statutory requirements; and 2.) the claim adequately discloses sufficient information to enable the public entity to investigate the merits of the claim so as to settle the claim, if appropriate.

In this case, Plaintiff alleged that the complaint form filled out by his mother complied with the Claims Act. The Court of Appeal disagreed, holding that substantial compliance cannot cure the total omission of an essential element from the claim. The court found that the complaint form did not provide an indication to the District that Plaintiff intended to sue. Further, the failure to even estimate the amount of damages on the purported claim document could not be remedied.

Plaintiff also contended that his mother relied on statements made by the District that that the complaint form was all that she needed to fill out and that the District should be estopped from asserting the complaint form was insufficient. The Court of Appeal again disagreed, holding that while a public entity may be bound by equitable estoppel, the circumstances changed when Plaintiff acquired counsel. For purposes of analyzing estoppel claims, attorneys are charged with knowledge of the law in California. Tubbs v. Southern Cal. Rapid Transit Dist. (1967) 67 Cal. 2d. 671, 679. Here, the court found that Plaintiff and his attorney had sufficient time to determine that a compliant claim was required to be presented within the mandatory one-year period. The judgment in favor of the District was therefore affirmed.

MUNICIPAL GOVERNMENT ADMINISTRATION

City of Grants Pass, Oregon v. Johnson (2024) 144 S. Ct. 22202

Summary: Plaintiffs filed a putative class action on behalf of homeless people living in Grants Pass, Oregon, claiming that the City's anti-camping ordinances against public camping violated the "cruel and unusual" punishment provision of the Eighth Amendment to the United States Constitution. The United States Supreme Court held that the enforcement of generally applicable laws regulating camping on public property does not constitute "cruel and unusual punishment" prohibited by the Eighth Amendment.

Discussion: Grants Pass, Oregon is a City of approximately 38,000 residents, of which approximately 600 experience homelessness on a given day. Similar to many local governments in California and the nation, Grants Pass has public camping laws that restrict encampments on public property. Initial violations can trigger a fine, while multiple violations can result in imprisonment.

DANGEROUS CONDITION, IMMUNITIES AND AFFIRMATIVE DEFENSES, CLAIM PRESENTATION, AND MUNICIPAL GOVERNMENT ADMINSITRATION CASES- CONTINUED

By: Dana Quinn, Maria Nozzolino, Nico D. Syren, Mark F. Hazelwood, and Matthew T. Matejcek of Allen, Glaessner, Hazelwood & Werth LLP

In a prior decision, Martin v. City of Boise, 920 F. 3d 584 (2019), the Ninth Circuit Court of Appeals held that the Eighth Amendment's "cruel and unusual punishment" clause bars cities from enforcing public camping ordinances (like the Grants Pass ordinance) against homeless individuals whenever the number of homeless individuals in a jurisdiction exceeds the number of "practically available" shelter beds.

Plaintiffs in this case filed a putative class action on behalf of homeless people in Grants Pass. The district court certified the class and entered an injunction prohibiting Grants Pass from enforcing its' laws against the homeless, pursuant to the holding in Martin. Applying Martin's holding, the district court found everyone without a shelter in Grants Pass was involuntarily homeless, because the City's total homeless population outnumbered the available number of shelter beds. The Ninth Circuit affirmed the district court's injunction. Grants Pass then filed a petition to the Supreme Court. Many California cities urged the Supreme Court to grant review to assess Martin.

Plaintiffs contended that the ordinances in question criminalized the "mere status" of being homeless. Further, Plaintiffs contended that the ordinances were overwhelmingly being applied to the homeless population. Writing for the majority, Justice Neil Gorsuch rejected Plaintiffs' arguments. The Court held that Grants Pass's public-camping ordinances do not criminalize status. Rather, they prohibit actions undertaken by any person, regardless of status. Further, the Court held that the complex causes of homelessness are many, as well as the possible public policy responses required to address it. The Court held that nothing within the Eighth Amendment grants federal judges responsibility for assessing those causes and devising responses. Those responsibilities rest with citizens and their local governments.