LCW Liebert Cassidy Whitmore

Briefing Room

News and developments in employment law and labor relations
for California Law Enforcement Management.

MAY 2019

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Los Angeles | Tel: 310.981.2000
San Francisco | Tel: 415.512.3000
Fresno | Tel: 559.256.7800
San Diego | Tel: 619.481.5900
Sacramento | Tel: 916.584.7000

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CONSTITUTIONAL RIGHTS

Ninth Circuit Withdraws Its 2018 Opinion And Upholds Probationary Release Of Officer For On-Duty Calls And Texts To Paramour-Officer.

Janelle Perez, a probationary police officer, began a romantic relationship with Shad Begley, another officer employed at the same municipal police department. Both officers separated from their respective spouses once they began working together.

The department then received a written citizen's complaint from the male officer's wife, alleging that the two officers were having an extramarital relationship, on-duty sexual contact, and numerous on-duty communications via text and telephone.

The department's internal investigation found no evidence of on-duty sexual relations, but did find that the officers called or texted each other several times while on duty. The investigation ultimately sustained charges that both officers (i) violated the department's telephone policies, (ii) violated the department's "unsatisfactory work performance" standard, and (iii) engaged in "conduct unbecoming" for their personal, on-duty contact.

On August 16, 2012, the department sent a letter to Begley's wife informing her that its investigation into her citizen complaint was completed. The letter also listed the sustained charges against the officers.

Based on the department's custom of terminating probationary officers who violate policies, the Internal Affairs Captain overseeing the investigation recommended that Perez be terminated. The Chief disagreed, and decided a written reprimand based on the two sustained charges against both officers was sufficient.

Both officers appealed the written reprimands. While the appeals were pending, the officers continued their personal relationship. Before the date of Perez's administrative hearing, the Chief received negative comments about Perez's job performance from several sources.

Perez's administrative appeal of her reprimand concluded in September 2012. Based on the evidence, the Chief sustained her reprimand for violating the department's telephone policy. However, based on the recent negative comments about Perez's job performance and the sustained policy violation, the Chief released Perez from probation on September 4, 2012. The Chief confirmed that the officers' affair played no role in his decision to release Perez.

Perez then sued the city, the police department, and individual members of the department. She claimed, among other things, that her release violated her constitutional right to privacy and intimate association because it was impermissibly based in part on management's disapproval of her private, off-duty sexual conduct.

The district court granted summary judgment in favor of the city defendants on all claims, and Perez appealed.

In its first decision in this case in 2018, the Ninth Circuit reversed the city defendants' summary judgment as to Perez's privacy and intimate association claims. In that decision, the Ninth Circuit opined that Perez had presented sufficient evidence that "[a] reasonable factfinder could conclude that [the Captain overseeing the investigation] was motivated in part to recommend terminating Perez on the basis of her extramarital affair, and that he was sufficiently involved in Perez's termination that his motivation affected the decision-making process."

Following the death of Judge Stephen Reinhart, who was on the panel that issued the 2018 opinion, the Ninth Circuit withdrew the 2018 opinion and issued a new one. The second opinion gave summary judgment to the individual defendants based on qualified immunity.

The Ninth Circuit noted that under the doctrine of qualified immunity, courts may not award damages against a government official in his or her personal capacity "unless the official violated a statutory or constitutional right, and the right was clearly established at the time of the challenged conduct." To determine whether there is a violation of clearly established law, courts assess whether any prior cases establish a right that is "sufficiently definite."

The Ninth Circuit first examined *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), which explicitly rejected a per se rule that a police department can never consider its employees' sexual relations. Rather, Thorne held that a police department could not inquire about or consider a job applicant's past sexual history that was irrelevant to on-the-job considerations.

Similarly, in *Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987), the Ninth Circuit held that a police department could fire a probationary police officer over criminal sexual conduct that occurred before he was hired because it "compromised [the officer's] performance as an aspiring police officer" and "threatened to undermine the Department's community reputation and internal morale."

The Ninth Circuit held that *Thorne* and *Fleisher* did "not clearly establish that a police department is constitutionally prohibited from considering an officer's off-duty sexual relationship in making a decision to terminate her, where there is specific evidence that the officer engaged in other on-the-job conduct in connection with that relationship that violated department policy."

The Ninth Circuit held the individual defendants did not violate any clearly established law in terminating Perez because there was evidence from the investigation that Perez's on-duty personal telephone use was a clear violation of department policy that reflected negatively on the department. Therefore, the individual defendants had qualified immunity on the privacy and intimate association claims.

Perez also claimed that the individual defendants violated her constitutional right to due process under the Fourteenth Amendment by failing to: give her adequate opportunity to refute the charges made against her; and clear her name before she was released from probation. Specifically, Perez argued the defendants violated her right to due process by disclosing the charges sustained against her in the August 16, 2012 letter to the officer's wife.

The Ninth Circuit disagreed. To trigger a procedural opportunity to refute the charges, the employee must show: (i) the accuracy of the charge is contested; (ii) there is some public disclosure of the charge; and (iii) the charge is made in connection with termination of employment. The Ninth Circuit stated that the letter to the officer's wife regarding her citizen's complaint was not made "in connection with termination of employment" because there was an insufficient temporal nexus between that letter and Perez's release on September 4, 2012—19 days later. Therefore, the Ninth Circuit found the individual defendants had qualified immunity as to Perez's due process claim because they did not violate any clearly established law in terminating her.

Perez's complaint also claimed that her release was due to gender discrimination in violation of Title VII of the Civil Rights Act of 1964 and California's Fair Employment and Housing Act. But she conceded on appeal that the only "gender-related" discrimination she was alleging was based on her relationship with the other officer. The relationship, however, triggered only her rights to privacy and intimate association. In view of Perez's concession, the Ninth Circuit affirmed the grant of summary judgment to the individuals, the city and the department on those claims.

Perez v. City of Roseville, et al, 2019 WL 2182488 (unpublished).

NOTE:

Public safety managers must carefully analyze whether an employee's off-duty conduct impacts the workplace before issuing discipline. This case clarifies the circumstances when a public safety employer may lawfully consider its employee's off-duty sexual relations with a fellow officer.

DISCRIMINATION

Police Officers Seek Class Certification Following Ruling That Department's Promotional Examination Violates Title VII.

A group of over two dozen police officers are seeking class certification following a federal judge's ruling in Massachusetts that the Boston Police Department's promotional examination violated Title VII of the Civil Rights Act of 1964.

In *Smith v. City of Boston*, a 2015 decision, a Massachusetts district court found, after hearing testimony on the statistical effects of multiple choice examinations on minority participants, that a promotional examination administered by the Boston Police Department had a racially disparate impact on minority candidates. The district court also found that the examination was insufficiently job-related to comply with Title VII because the City could not demonstrate that the examination measured critical skills for promotion to the lieutenant position.

In *Lopez v. City of Lawrence*, a 2016 decision, however, the First Circuit (which covers Massachusetts and nearby states) held that a promotional examination a Massachusetts police department used that was similar to the one analyzed in *Smith* was valid under Title VII. Notably, the examination at issue in *Lopez* was for promotion from the entry-level patrol position to sergeant. The First Circuit held that although the examination had a racially disparate effect on minority candidates, the examination was a "valid selection tool that helped the City select sergeants based on merit" and therefore was sufficiently job-related under Title VII.

Following *Lopez*, the parties to the *Smith* case asked the First Circuit to address the inconsistency between the *Lopez* and *Smith* decisions. Instead, the First Circuit asked the district court to reevaluate the *Smith* decision in light of *Lopez*.

Upon reconsideration in 2017, the district court upheld the *Smith* decision, stating that although the examinations at issue were generally similar, the cases involve different evidentiary records, different expert testimony, and examinations for promotions to different public safety positions.

The police officer plaintiffs in *Smith* now seek class certification for the remedy stage of the case, arguing that it would not be feasible to determine which officers would have been promoted if the examination had not been unfair under Title VII. The district court has not yet decided the request for class certification. The *Smith* case is scheduled for trial in July 2019.

Lopez v. City of Lawrence, Mass., 823 F.3d 102 (1st Cir. 2016); Smith v. City of Boston, 267 F.Supp.3d 325 (D. Mass. 2017); Smith v. City of Boston, 144 F.Supp.3d 177 (D. Mass. 2015).

NOTE:

Although these are Massachusetts cases, they may be indicative of how other courts may examine promotional examinations under Title VII. Further, the case confirms a public safety agency's potential exposure to class action lawsuits based on its promotional examinations. LCW attorneys specialize in advising public agencies regarding appropriate promotional examinations.

LABOR RELATIONS

Court Of Appeal Declines To Invalidate Initiative Placed On Ballot In Violation of MMBA.

The City of San Diego's Mayor Jerry Sanders championed a citizens' initiative in 2010 that would eliminate traditional defined benefit pensions for most newly-hired City employees, and replace them with defined contribution plans. The affected unions argued that Mayor Sanders was acting in his official capacity to promote the initiative and, in doing so, was making a policy determination that required

meeting and conferring with the unions under the Meyers-Milias-Brown Act ("MMBA"). The City's voters eventually adopted the initiative, without the City ever meeting and conferring with the unions.

In 2018, the California Supreme Court held that the City violated the MMBA because Mayor Sanders made a policy decision to advance a citizens' pension reform initiative without meeting and conferring with the affected employees' unions. The California Supreme Court then remanded the case to the Court of Appeal to determine the appropriate remedy for the City's violation of the MMBA.

On remand, the Court of Appeal declined to invalidate the citizens' pension reform initiative. The Court of Appeal concluded that because the voters adopted the initiative and it had taken effect, it could only be challenged in a special quo warranto proceeding. Thus, the validity of the initiative was beyond the scope of the court's review.

However, the Court of Appeal did order the City to meet and confer with the unions over the effects of the initiative and to pay the affected current and former employees the difference, including interest, between the compensation the employees would have received before the initiative went into effect, and the compensation the employees received after the initiative became effective. The court reasoned that this remedy reimburses the employees for the losses they incurred and reduces the City's financial incentive for refusing to bargain.

Additionally, the Court of Appeal ordered the City to cease and desist from refusing to meet and confer with the unions. The Court found that the City is required to meet and confer upon the unions' request before the City can place a measure on the ballot that affects employee pension benefits or other negotiable subjects. The Court noted that this remedy was appropriate because it "prevents the City from engaging in the same conduct that violated the [MMBA] in this case without impermissibly encroaching on matters more appropriately decided in a separate quo warranto proceeding."

Boling v. Public Employment Relations Bd., 245 Cal. Rptr.3d 78 (2019).

NOTE:

LCW previously reported on the California Supreme Court's decision in this case in the September 2018 Client Update and in a blog post available here: https://www.lcwlegal.com/news/voter-backed-pension-reform-is-dealt-a-blow-by-california-supreme-court.

RETIREMENT

Employee Who Settles A Pending Termination for Cause, And Agrees Not To Seek Reemployment, Is Not Eligible for Disability Retirement.

In 2001, Linda Martinez began working at the State Department of Social Services ("DSS") after working for the State since 1985. During this time, Martinez also served in various positions with her union.

In 2014, DSS sought to terminate Martinez's employment and provided her with a notice citing numerous grounds for her dismissal. Martinez challenged the dismissal, believing that her termination "was taken in retaliation for her union activities."

The parties later negotiated a settlement. DSS agreed to: pay Martinez $30,000; withdraw the notice for dismissal; and remove certain matters from her personnel file. In return, Martinez agreed to voluntarily resign effective September 30, 2014. DSS also agreed to cooperate with any application for disability retirement filed by Martinez within the six months following her voluntarily resignation.

Martinez filed her disability retirement application on the grounds that she could longer function in her role at DSS because of various job-related conditions. The California Public Employees Retirement System ("CalPERS") cancelled her application. CalPERS notified Martinez that she was not eligible for disability retirement because she was "dismissed from employment for reasons which were not the result of a disabling medical condition" and that "the dismissal does not appear to be for the purpose of preventing a claim for disability retirement." Martinez appealed the denial to the Board of CalPERS, which denied Martinez's petition for reconsideration.

Martinez and her union then sued CalPERS, its Board, and DSS to request the court to order the Board to set aside and reverse its decision. The trial court denied Martinez's petition.

Ordinarily, governmental employees lose the right to apply for disability retirement if they are terminated for cause. However, prior decisions have carved out exceptions to this general rule. For example, in *Haywood v. American River Protection District*, 67 Cal.App.4th 1292 (1998), the court held that a terminated-for-cause employee can still qualify for disability retirement when the conduct which prompted the termination was the result of the employee's disability. In *Smith v. City of Napa*, 120 Cal.App.4th 194 (2004), the court concluded that a terminated employee may qualify for disability retirement if he or she had a "matured right" to a disability retirement prior to the conduct that prompted the termination.

Further, relying on *Haywood* and *Smith*, the CalPERS Board determined that an employee loses the right to apply for disability retirement when the employee settles a pending termination for cause and agrees not to seek reemployment. The CalPERS Board reasoned that such a situation is "tantamount to dismissal." (*In the Matter of Application for Disability Retirement of Vandergoot*, CalPERS Precedential Dec. No. 12-01 (2013).)
On appeal, Martinez argued that *Haywood* and *Smith* have been superseded by statute and that the Board's decision in *Vandergoot* is no longer precedential. Specifically, Martinez relied on a 2008 amendment to the retirement law that provides "[i]n determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process." Thus, Martinez argued that determinations of eligibility for disability retirement can only be made because of competent medical opinion.

However, the Court of Appeal disagreed. The court noted that the section Martinez relied on "is but a single sentence in a single statute, and cannot be examined to the exclusion" of the entire retirement law. The Court noted that because Martinez's voluntary resignation "constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement." As a result, the Court said that the 2008 amendment to the retirement law did not supersede *Haywood* and *Smith*. Further, the Court concluded that the Board's decision that a settlement not to seek reemployment is "tantamount to dismissal" was "eminently logical." Thus, the precedent established in *Haywood*, *Smith*, and *Vandergoot* remains the law.

Martinez v. Public Employees' Retirement System, 2019 WL 1487326 (unpublished).

NOTE:

This case confirms that an employee who settles a pending termination for cause and agrees not to seek reemployment is precluded from applying for disability retirement. LCW attorneys specialize in advising public agencies regarding the complexities of retirement law.

New to the Firm

Donald Le is an Associate in Liebert Cassidy Whitmore's Los Angeles office where he assists clients in matters pertaining to labor & employment law as well as business, construction and facilities. He represents the interests of both public and private sector clients in transaction and litigation matters. He has experience representing and advising owners, contractors, design professionals, and large subcontractors on a wide variety of construction matters and projects throughout the state.

He can be reached at 310.981.2020 or dle@lcwlegal.com.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

June 13 **"Creating a Culture of Diversity in Hiring, Promotion and Supervision"**
LA County HR Consortium | Los Angeles | Kristi Recchia

June 19 **"Leaves, Leaves and More Leaves"**
Orange County Consortium | Buena Park | Jennifer Rosner

June 20 **"The Future is Now - Embracing Generational Diversity and Succession Planning"**
San Mateo County ERC | Belmont | Heather R. Coffman

Customized Training

June 1 **"The Future is Now - Embracing Generational Diversity & Succession Planning"**
City of Brea | Jennifer Palagi

June 3,6,12,14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Kristin D. Lindgren

June 4 **"Training Academy for Workplace Investigators: Core Principles, Skills & Practices for Conducting Effective Workplace Investigations"**
City of Los Angeles | Julie L. Strom

June 4,12,13 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Newport Beach | Christopher S. Frederick

June 6,10,11 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of El Segundo | Jenny Denny

June 13 **"Ethics in Public Service"**
City of Rancho Cucamonga | Kevin J. Chicas

June 13 **"Communications Regarding Critical Incidents"**
City of South Gate | J. Scott Tiedemann

June 13 **"Managing the Marginal Employee"**
County of Riverside | Riverside | Danny Y. Yoo

June 14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Glendale | Stacey H. Sullivan

June 19 **"Mandated Reporting"**
City of Rancho Cucamonga | Christopher S. Frederick

Speaking Engagements

June 4 **"SB 1421 Peace Offcier Personnel Records: An Update on the Latest Developments"**
League of California Cities | Webinar | J. Scott Tiedemann

June 20 **"Will the California Rule Survive? Update on State Pension Litigation"**
Southern California Public Labor Relations Council (SCPLRC) | Cerritos | Steven M. Berliner

June 25 **"A General Manager's Guide to Bringing Out the Best in their Boards, Commissions and Elected Officials"**
California Special Districts Association (CSDA) General Manager Leadership Summit | Newport Beach | T. Oliver Yee

Seminars/Webinar

June 5 **"How to Hire CalPERS Retirees the Right Way"**
Liebert Cassidy Whitmore | Webinar | Steven M. Berliner

June 20 **"The Rules of Engagement: Issues, Impacts & Impasse"**
Liebert Cassidy Whitmore | Suisun City | Richard Bolanos & Kristi Recchia

ON THE MOVE!

Our SAN DIEGO Office is relocating! As of June 1, we'll be located at:
401 West "A" Street,
Suite 1675
San Diego, CA 92101
619.481.5900

Firm Publications

To view these articles and the most recent attorney-authored articles, please visit: **www.lcwlegal.com/news**

Partner **Elizabeth Tom Arce**, from our Los Angeles office, was featured in the March 27, 2019 *Los Angeles County Bar Association's Daily eBriefs* "Member Benefit Spotlight" in honor of Women's History Month.

"California's Minimum Wage Applies to Charter Cities and All Counties" quote by Partner **Peter J. Brown** and Associate **Megan Atkinson** of our Los Angeles office, appeared in the April 1, 2019 issue of the *Daily Journal*.

"Is the Holiday Over? California Public Agencies May Face a Barrage of FLSA Lawsuits for Holiday Pay" quote by Partner **Jesse Maddox** and Associate **Bryan Rome** of our Fresno and Sacramento offices, appeared in the April 3, 2019 issue of the *Daily Journal*.

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