

FIRE WATCH

News and developments in employment law and labor relations for
California Fire Safety Management

JUNE 2020

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FIRM VICTORY

PERB Dismisses Employee's Unfair Practice Charge Filed Against County.

LCW Partner [Adrianna Guzman](#) and Associate Attorney [Lars Reed](#) obtained a victory for a County after a former employee filed an unfair practice charge with the Public Employment Relations Board (PERB).

The former employee alleged that the County violated the Meyers-Milias-Brown Act (MMBA) by retaliating and discriminating against her. The employee's allegations stemmed from a Child Protective Services referral regarding the children of her boyfriend, with whom she lived. A social worker issued a final investigation report against the employee and her boyfriend that substantiated allegations of general child neglect. The County's Program Director then added a paragraph to the employee's performance report indicating that she would not be able to work in a certain assignment. This was because County policy prohibited employees with a "substantiated" allegation from working in a particular unit. The County provided the employee with a final copy of the report.

Subsequently, the employee submitted a rebuttal to her performance report as authorized by County policy. The County attached her rebuttal to the report, and placed both documents in her personnel file. Shortly thereafter, the employee provided three weeks' notice of her resignation. The employee then filed an unfair practice charge with PERB three days before her last day of employment.

In order to demonstrate that an employer discriminated or retaliated against an employee in violation of the MMBA, PERB requires the employee to show that: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse employment action against the employee; and (4) the employer took the action because of the exercise of those rights. PERB concluded that the former employee could not show those elements. PERB reasoned that the employee failed to allege with specificity that she participated in any conduct protected under the MMBA or that the County took an adverse employment action against her. It also noted that even if the County took adverse action against her, the employee did not allege sufficient facts to show there was any unlawful motivation. Thus, PERB concluded the employee could not demonstrate a prima facie case of retaliation or discrimination.

While PERB gave the employee the opportunity to amend her claims, she failed to do so. Accordingly, PERB dismissed the unfair practice charge against the County.

NOTE:

An employee who files an unfair practice charge must establish all of the necessary elements of the claim. If the employee does not, PERB will dismiss the charge and no complaint issues. LCW attorneys strategically challenge unfair practice charges before they reach the complaint stage.

COVID-19

Assistant Chief Of Police Safely Guides Department Through COVID-19 Exposure.

In May 2020, a city's police department faced a serious COVID-19 exposure when five police officers and a jailer came into contact with an arrestee with the virus. In response, the department's Assistant Police Chief employed a decision tree prepared by LCW outlining a step-by-step process to respond to COVID-19 exposure. Following the decision tree, the department took the necessary steps to minimize further exposure and ensure the safety of department personnel, including isolating the impacted employees, disinfecting areas of potential exposure, and arranging for testing of the impacted employees. Through the Assistant Police Chief's actions, the department was able to handle a difficult situation in a safe and respectful manner to the benefit of the impacted employees and their co-workers.

NOTE:

Agencies are facing unprecedented times in ensuring the health and safety of their personnel in light of the COVID-19 pandemic. LCW is proud to have assisted the city's police department in carrying out this critical public safety duty.

LABOR RELATIONS

City Policy Prohibiting Stickers On Employees' Hardhats Violated MMBA.

Employees in the City of Sacramento's Maintenance Services Division (MSD) are required to wear hardhats while working. Six of the seven MSD sections exclusively use a white, full-brimmed hardhat manufactured by ERB Industries (ERB) bearing the City seal. ERB affixes the seal by applying ink directly to the hardhat before shipping the hardhats to the City. An ERB warning label inside each hardhat states "Do not apply adhesive. These chemicals may weaken the shell." Despite this warning, MSD employees sometimes attach headlamps to their ERB hardhats using clips and removable adhesive. The City provides employees in the seventh MSD section an orange hardhat manufactured by Petzl. Like the ERB hardhats, Petzl cautions against applying chemical adhesive or stickers to its hardhats unless those are supplied or recommended by Petzl.

All MSD employees are expected to inspect their hardhat each day before use; however, management is responsible for deciding when to retire or replace a hardhat. In 2016, an MSD Operations General Supervisor became concerned that it was unsafe to adorn the hardhats with

any stickers, decals, or paint because these substances could hinder their inspection for signs of wear, cracks, and other deterioration.

In April 2017, the MSD circulated a memorandum to some employees providing that "So as to not compromise the integrity of the protective shell, hardhats must be free of stickers, decals, or any other markings (except for the City seal) and not be painted." Prior to this memorandum, the MSD did not have a written policy regarding the placement of stickers or paint on hardhats. Employees were, however, permitted to wear union pins and other insignia on their work uniforms or other personal property.

The City notified Stationary Engineers Local 39 (Local 39) – an employee organization representing some MSD employees – of the written hardhat policy. Local 39 asserted that the City's policy would infringe on employees' rights to place union insignia on their hardhats. After the City distributed the policy, Local 39 filed an unfair practice charge against the City. The Administrative Law Judge (ALJ) dismissed the charge, finding the policy was justified by the City's legitimate concerns for employee safety. Local 39 subsequently filed exceptions with the Public Employment Relations Board (PERB).

California public employees have long had the right to wear union insignia in the workplace. A restriction on the right to display union insignia and messages regarding working conditions is presumptively invalid. Instead, an employer may prohibit employees from displaying union insignia and messages in the work place only if "special circumstances" exist to justify the prohibition. The employer has the burden of establishing that its policy is justified by special circumstances. PERB has outlined several factors to determine whether such circumstances exist, including whether the insignia could jeopardize employee safety, disrupt employee discipline, or negatively affect the employer.

In this case, PERB found that the City could not establish any foreseeable safety issues arising from stickers on hardhats. PERB reasoned that while employees were required to inspect their hardhats every day, neither the applicable memorandum of understanding nor the MSD policies prescribed any regular inspection of hardhats. Thus, PERB reasoned that the City had not "shown so great a safety-related concern for dented, gouged, or otherwise damaged hardhats that would institute regular and closer inspections of them."

Further, PERB noted that it was undisputed that some MSD employees affixed headlamps to their hardhats using clips and removable adhesive. The City presented no evidence that the adhesive used to affix the headlamps had been supplied by the manufacturer; had damaged the

hardhat; or had prevented employees from detecting such damage. PERB also explained that this history of adhesive use on hardhats without incident also weighed against finding special circumstances.

Accordingly, PERB found the City failed to carry its burden of establishing safety-based special circumstances justifying its policy completely banning stickers, decals, and paint on MSD employees' hardhats. Thus, PERB determined that the City's policy interfered with employees' and Local 39's rights under the MMBA.

City of Sacramento, PERB Decision No. 2702-M (2020).

NOTE:

This case demonstrates that an agency has the burden of proving that special circumstances justify prohibiting union insignia. That proof must include concrete evidence that it is foreseeable that employee safety will be threatened by displaying the insignia and that the agency has acted consistently with its stated concern.

RETALIATION

Police Officer Fails To Timely File A Government Claim In Whistleblower Retaliation Case.

James Willis began his employment with the City of Carlsbad's Police Department in 2008. In 2012, Willis created a fictitious email account under a pseudonym, wrote a critical email about another detective who worked in his unit, and sent the email to various news organizations and government entities. In 2013, Willis was reassigned from the crimes of violence unit to patrol. In 2014, Willis was promoted to corporal and elected president of the local police officer's association. In 2015, Willis complained that the Department's monthly performance review for patrol officers constituted an illegal quota under the Vehicle Code because it collected statistical data about arrests and citations. Later that year, Willis was not selected for a promotion to sergeant.

In December 2015, Willis filed a complaint with the Department of Fair Employment and Housing and a government tort claim against the City, including, among other allegations, retaliation based on his reassignment to patrol in 2013 and failure to be promoted in 2015. The City deemed all acts occurring before June 2015—six months before the date it received Willis's claim—untimely because they occurred beyond the six-month period to present a claim under the Government Claims Act.

In 2016, Willis then brought a civil lawsuit against the City, alleging in part that the City engaged in whistleblower retaliation in violation of Labor Code

section 1102.5 by denying him promotions after he reported alleged misconduct by another officer in 2012 and complained in 2015 about the Department program he believed was an unlawful quota system.

Before trial, the City successfully moved to strike Willis's allegations of retaliatory acts that occurred before June 2015 on the grounds that he failed to timely present a government tort claim. The jury ultimately found that the City denied Willis a promotion in part because he reported that the City had engaged in unlawful conduct. However, the jury also found that the City would have still denied Willis the promotion for legitimate independent reasons, and therefore, the court entered judgment for the City on the whistleblower retaliation claims.

Willis appealed, claiming the trial court erred by striking certain allegations outside of the Government Claims Act's six-month deadline. Willis argued that the deadline to file a government tort claim was either equitably tolled, or his whistleblower retaliation claim had not accrued by reason of the continuing tort/continuing violation doctrine. First, the court of appeal determined that the doctrine of equitable tolling, which suspends a statute of limitations under certain circumstances to ensure fairness, cannot be invoked to suspend the six-month deadline under the Government Claims Act because the deadline is not a statute of limitations. The court of appeal also stated that tolling would undercut the public policy underlying the deadline, which is to give a public entity prompt notice of a claim to enable it to adequately investigate and settle them without litigation, as appropriate. The court stated that these policy considerations would not be served by tolling the government claim deadline while a plaintiff pursues other legal remedies against a public entity.

Second, the court concluded that the six-month deadline under the Government Claims Act could not be extended as a continuing violation. The continuing violation doctrine allows liability for conduct occurring outside a statute of limitations if the conduct is sufficiently connected to conduct within the limitations period. To establish a continuing violation, an employee must show that the employer's actions are: (1) sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence. However, the court determined that Willis's allegations, including reassigning him and denying him promotions, were permanent at the time the personnel decisions were made, which precluded application of the continuing violation doctrine.

For these reasons, the court of appeal held the trial court did not abuse its discretion in striking allegations from Willis's complaint due to his failure to present a timely government claim.

Willis v. City of Carlsbad, 2020 WL 2394728 (2020).

NOTE:

This case confirms that courts generally interpret an employee's six-month deadline to file a government claim under the Government Claims Act as a strict deadline. Public entities maintain a unique status with respect to these protections since public entities will incur costs in the course of litigation that must ultimately be borne by taxpayers.



PLEASE NOTE: We will not have a newsletter for the month of July and will resume in August.

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FIRM PUBLICATIONS

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

Los Angeles Senior Counsel [David Urban](#) was featured in the *Daily Journal* article, "Constitutional Experts Weigh in on New Videoconferencing Marriage Order."

San Diego Partner [Frances Rogers](#) and Los Angeles Associate [Kate Im](#) authored an article for the *Santa Monica Observer* titled "Medical Marijuana for School Students? It's Now Authorized in California."

Los Angeles Partner [Oliver Yee](#) and Los Angeles Associate [Alysha Stein-Manes](#) authored an article for *Law360* titled "Telework Transition Holds Key Lessons for Public Agencies."

For the latest COVID-19 information,
visit our website:

- **Complimentary Templates**
- **Special Bulletins**
- **Related Trainings**

www.lcwlegal.com/responding-to-COVID-19

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

- | | |
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| Jun. 11 | “Finding the Facts: Employee Misconduct and Disciplinary Investigations”
South Bay ERC Webinar Melanie L. Chaney |
| Jun. 17 | “Maximizing Supervisory Skills for the First Line Supervisor Part 1”
Monterey Bay ERC Webinar Kristi Recchia |
| Jun. 17 | “Maximizing Supervisory Skills for the First Line Supervisor Part 1”
Orange County Consortium Webinar Kristi Recchia |
| Jun. 18 | “Supervisor’s Guide to Understanding and Managing Employees’ Rights: Labor, Leaves and Accommodations”
L.A. County Human Resources Consortium Webinar Laura Drottz Kalty |
| Jun. 18 | “Maximizing Performance Through Evaluation, Documentation and Corrective Action”
San Mateo County ERC Webinar Erin Kunze |

- Jun. 25** **“Maximizing Supervisory Skills for the First Line Supervisor Part 2”**
Monterey Bay ERC | Webinar | Kristi Recchia
- Jun. 25** **“Maximizing Supervisory Skills for the First Line Supervisor Part 2”**
Orange County ERC | Webinar | Kristi Recchia
- Jul. 9** **“Public Sector Employment Law Update”**
Mendocino County ERC | Webinar | Richard S. Whitmore
- Jul. 29** **“Ethics For All”**
Monterey Bay ERC | Webinar | Kristi Recchia

Customized Training

- Jun. 11** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Stockton | Webinar | Kristin D. Lindgren
- Jun. 16** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Stockton | Webinar | Gage C. Dungy
- Jun. 16** **“Navigating Public Sector Employment”**
Orange County Sanitation District | Webinar | T. Oliver Yee
- Jun. 23** **“Unconscious Bias”**
City of Tracy | Webinar | Kristin D. Lindgren
- Jun. 29** **“Privacy Issues in the Workplace”**
City of Richmond | Brian J. Hoffman
- Jul. 8, 9** **“Preventing Workplace Harassment, Discrimination and Retaliation”**
City of Walnut Creek | Jack Hughes
- Jul. 21** **“Payroll Issues”**
City of Oxnard | Amit Katzir

Speaking Engagements

- Jun. 12** **“The Tension Between Privacy and the Public’s Right to Know”**
Law Seminars International Public Records Act Litigation Seminar | Webinar | Geoffrey S. Sheldon

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