CPOA CASE SUMMARIES – OCTOBER 2024

EMPLOYMENT

A. City manager not bound by arbitrator’s findings with respect to the evidence supporting termination of a police officer under the city’s Memorandum of Understanding.

Ramirez v. City of Indio, 105 Cal. App. 5th 939 (4th Dist. 2024)

Facts: Sergio Ramirez was employed as a police officer in the City of Indio Police Department (“City”) since 2005. In August 2016, Ramirez was charged with rape and sexual assault of his 18-year-old niece. The City placed Ramirez on administrative leave, and initiated an internal affairs (“IA”) investigation. A jury acquitted Ramirez of all criminal charges. In a November 2018 memorandum to the Chief of Police, the sergeant who conducted the IA investigation concluded Ramirez had violated multiple standards of conduct set forth in the Indio Police Department policy manual, including misrepresenting material facts, dishonest or disgraceful off-duty conduct affecting the officer's relationship with the department, and conduct reflecting unfavorably on the department. In June 2019, the Chief issued a notice of intent to terminate Ramirez, and in October 2019, the Chief issued a notice of termination based on Ramirez's violations of the Department's standards of conduct, expectations of behavior, and code of ethics.

Ramirez administratively appealed the Chief’s decision under the “Appeals Procedure” set forth in the memorandum of understanding (“MOU”) between the City of Indio and the Indio Police Officers' Association. After a full evidentiary hearing, the arbitrator recommended the reinstatement of Ramirez with full backpay and benefits.

After reviewing the arbitrator's written statement of advisory findings and recommendations, the MOU, the Chief's notice of intent to terminate and notice of termination and associated attachments, the City's policies, the Indio Police Department's policies and standards, the IA investigation documents and investigation transcripts, transcripts of criminal trial, and transcripts from the arbitration hearing and associated motions, responses, briefs, and exhibits, the City Manager issued a detailed final written decision in December 2021, rejecting the arbitrator's advisory findings and recommendation and upheld the decision to terminate Ramirez. Ramirez challenged the City Manager's final administrative decision by petitioning the superior court for writ of mandate pursuant to Code of Civil Procedure sections 1085 and 1094, but that court denied his petition in a detailed statement of decision.

Ramirez appealed, arguing that the superior court erroneously interpreted the arbitrator's role in the MOU's administrative appeal procedure. Although he acknowledged that the MOU vested the City Manager with power to revoke the arbitrator's advisory findings and recommendations, Ramirez contended that the MOU and due process considerations required the City Manager to defer to the arbitrator's determinations of the weight and credibility of testimony and evidence presented at the hearing.

<u>Held</u>: The Fourth District Court of Appeal observed that police officers have a statutory right to an administrative appeal of any punitive action under section 3304, subdivision (b) of the Public Safety Officers Procedural Bill of Rights Act ("POBRA") (Government Code section 3300 et seq.). The administrative appeal "shall be conducted in conformance with rules and procedures adopted by the local public agency" (*id.*, section 3304.5), which here were set forth in article 19, the Appeals Procedure of the MOU. The Court explained that its interpretation of the MOU was guided by the well-settled rules of contract interpretation (*National City Police Officers' Assn. v. City of National City* (4th Dist. 2001) 87 Cal.App.4th 1274, 1279), adding that the language of the MOU, if clear and explicit, governed the court's interpretation. (*Ibid.*) In addition to complying with POBRA and the terms of the MOU, the court explained that "a public entity must accord constitutional procedural due process before depriving an officer of any significant property interest in his or her employment." (*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321, fn. 6.)

The Fourth District noted that Article 19 of the MOU, entitled Appeals Procedure, was "designed to provide an appeal system for the fair and just resolution of any dispute, real or imagined, regarding proposed disciplinary action between the City of Indio and an employee." The parties to the MOU expressly intended "[t]o provide an orderly procedure to handle the appeal through each level of supervision, if necessary, *with final decision being vested in the City Manager*." (Italics added.) The Court explained that as unequivocally stated in sections 19.3 and 19.4 of the MOU, the arbitrator had the authority to provide "advisory" findings and recommendations "to affirm, modify, or revoke the discipline imposed by the Appointing Authority or his/her designee." The City Manager's authority was reflected in section 19.6, which provides "the City Manager's written findings and decision will be the City's final administrative decision on the employee's appeal" and informs employees of their right to timely petition the court for a writ of administrative mandate.

The Court found that nothing in the MOU's language or framework suggested any intent to extend the arbitrator's authority beyond the hearing itself or to require the City Manager to defer to the arbitrator's relevancy, weight and credibility findings. Nor did Ramirez establish any violation of the MOU's Appeals Procedure by the City or the City Manager that could otherwise warrant reversal. Before exercising his authority to revoke the arbitrator's findings and recommendations, the City Manager fulfilled his duty under section 19.5 of the MOU to "review the Arbitrator's findings and recommendations" by performing "a complete and through review of [Ramirez's] appeal, including a review of the Hearing Officer's Advisory Findings and Recommendation." The City Manager went further by reviewing additional relevant documents and the transcripts and providing a detailed analysis supporting his conclusion that the City had successfully shouldered its burden of proof to show "justifiable cause for termination" by a preponderance of the evidence.

The Fourth District further concluded that the MOU's appeals procedure satisfied due process requirements. The Court noted that after the Chief provided Ramirez with a notice of termination that included the specific reasons and materials upon which the proposed termination was based, Ramirez had an opportunity to respond to the Chief in writing (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215), and, at the appeal hearing before the arbitrator, the City maintained the burden of proof while Ramirez was given a meaningful opportunity to present his side of the story by presenting evidence and cross-examining witnesses. An independent arbitrator conducted a "de

novo" reexamination of the chief's decision to terminate Ramirez and did not consider the chief's underlying findings as established. In addition to the advisory findings and recommendations of the arbitrator, the City Manager, who was similarly not involved in the decision to terminate Ramirez, conducted yet another independent reexamination of the Chief's decision and bridged the analytical gap between the raw evidence and the ultimate decision upholding the termination. (See *Joseph v. City of Atwater* (5th Dist. 2022) 74 Cal.App.5th 974, 988, citing *Caloca v. County of San Diego* (4th Dist. 2002) 102 Cal.App.4th 433, 444.)

Accordingly, the Fourth District Court of Appeal affirmed.

B. Employee letter to human resources complaining of workplace harassment was privileged and therefore could not be the basis of libel and slander claims.

Osborne v. Pleasanton Auto. Co., 2024 Cal. App. LEXIS 692 (1st Dist. Oct. 31, 2024)

Facts: In March 2020, Eva Osborne sued Defendants Pleasanton Automotive Company, LOP Automotive Company LP, HAG Automotive Investments LP (collectively, "HAG"), and its Executive General Manager and Market Area Vice President, Bob Slap.[1] The suit asserted eight causes of action for discrimination, retaliation, harassment, failure to prevent harassment and retaliation and wage and hour violations arising from alleged workplace misconduct by Slap during four years when Osborne was working as Slap's executive assistant.

In August 2022, more than two years into the litigation, Slap filed a cross-complaint against Osborne, alleging statements in a December 2019 letter she submitted to HAG's human resources director ("HR director") three months before she filed suit constituted libel, slander, intentional infliction of emotional distress, intentional interference with contractual relations and negligence.

In response, Osborne filed a special motion to strike (the motion) under the anti-SLAPP law (California Code of Civil Procedure section 425.16), contending Slap's claims against her arose out of protected activity she undertook in anticipation of litigation. She asserted Slap could not show he would likely prevail on the merits because, among other reasons, her statements were absolutely privileged by Civil Code section 47.

The superior court granted Osborne's motion, concluding her statements were protected activity under the anti-SLAPP statute and rejecting Slap's arguments that they were extortionate and illegal as a matter of law. The superior court held Slap could not establish minimal merit in his claims, as required to withstand an anti-SLAPP challenge, in part because Osborne's statements were absolutely privileged under Civil Code section 47. Slap appealed.

Held: The First District Court of Appeal initially explained that the purpose of the anti-SLAPP statute is to "'prevent and deter "lawsuits [referred to as SLAPP's] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."'" (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 316.) The statute authorizes a special

[1] Osborne filed the suit on March 16, 2020, shortly after having filed a complaint and received a right to sue letter from the Department of Fair Employment and Housing ("DFEH").

motion to strike claims arising from any act "in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (Section 425.16(b)(1).)

"'A two-step process is used for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, by demonstrating that the facts underlying the plaintiff's complaint fit one of the categories spelled out in section 425.16, subdivision (e). If the court finds that such a showing has been made, it must then determine the second step, whether the plaintiff has demonstrated a probability of prevailing on the claim.'" (*Central Valley Hospitalists v. Dignity Health* (1st Dist. 2018) 19 Cal.App.5th 203, 216 ("*CVH*").) Once the defendant has met its burden of identifying allegations of protected activity and the claims for relief supported by them, the burden shifts to the plaintiff to demonstrate its claims have "have at least 'minimal merit.'" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061.)

The First District observed that besides the anti-SLAPP statute, this case involved the litigation privilege embodied in Civil Code section 47, subdivision (b). The Court stated that the anti-SLAPP statute is a procedural device to screen out meritless claims based on certain speech and petitioning activity. However, the litigation privilege is a substantive law that provides an absolute defense to tort liability for certain kinds of speech. Civil Code section 47 codifies common law privileges that operate as defenses against liability. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 737.) The Court noted that the litigation privilege "'is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.'" (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) A prelitigation communication may be privileged but "only when it relates to litigation that is contemplated in good faith and under serious consideration." (*Action Apartment*, at p. 1251; Section 47(b).) The litigation privilege "is absolute in nature, applying 'to *all* publications, irrespective of their maliciousness.'" (*Action Apartment*, at p. 1241.)

Regarding the first step in the SLAPP determination process, Slap did not deny that his cross-claims were all based on statements made by Osborne in the December 2019 HR letter, nor did he contest Osborne's argument that the statements in the HR letter were prelitigation statements that generally fell within subdivision (e)(1) and (e)(2) of the anti-SLAPP statute that identify protected activity. Rather, Slap argued that the challenged statements were made in furtherance of an attempted extortion and thus criminal as a matter of law and unprotected under *Flatley*. In *Flatley*, the California Supreme Court held that "section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Flatley, supra*, 39 Cal.4th at p. 317.) The First District found Slap's characterizations of Osborne's statements to him in her letter as tantamount to "blackmail" or "extortion" were unsupported by evidence or legal authority. The Court concluded that the statements on which Slap based his cross-claims were protected activity under Section 425.16(e)(1) and (2), and the *Flatley* exception did not apply. Thus, Osborne had satisfied her burden on the first prong of the anti-SLAPP analysis.

The Court of Appeal next considered the second step, whether Slap had demonstrated a probability of prevailing on his cross-claim. Osborne asserted the litigation privilege was an absolute bar to

Slap's complaint, and the superior court agreed. The First District noted that California courts have held that communications with "'some relation' to an *anticipated* lawsuit" are protected by the litigation privilege. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1194.) Citing cases that date back decades, the California Supreme Court explained, "numerous decisions have applied the privilege to prelitigation communications." (*Id.*; accord, *Action Apartment, supra*, 41 Cal.4th at p. 1241.)

Considering the evidence here, the First District noted that by the time Osborne sent the HR letter, she had already had "multiple communications" with the HR director about the subject matter of her "December 20 complaint" (the HR letter), including not getting paid for work she was doing for Slap. Osborne submitted a declaration attesting she had "been contemplating litigation in the days leading up to December 20, 2019" (the date of her letter) "because of the mistreatment I was experiencing working for Defendants." Osborne sent the HR letter to the HR director with a cover email, the subject line of which was "Formal Complaint," and which stated, "Per your direction last week I have put my complaint in writing. Please see attached." The letter referred to a discussion ten days earlier between Osborne and the HR director about "some of my concerns about my working relationship with Mr. Slap," in which Cassity told her "I would need to put these in writing before any action could be taken or my concerns could be addressed." The letter stated, "Accordingly, I am sending you this letter in a final effort to have my concerns acknowledged, addressed and resolved." The letter stated that "[a]lthough we have discussed some of these concerns on numerous occasions, and hoped that Mr. Slap's behavior would improve, I now find the work conditions unbearable and intolerable." It asserted that she "remain[ed] very concerned about retaliation by Mr. Slap and the Company." It requested "a prompt, fair and thorough investigation of my complaint, and protection from retaliation." The letter described Slap's conduct as "inappropriate, harassing and retaliatory," "hostile," "humiliating" and "abus[ive]." In more than four pages of single-spaced text, it went on to provide many examples of allegedly inappropriate, harassing, retaliatory and abusive conduct. These included Osborne's complaining to Slap about another employee who "had been sexually harassing [her] since [her] return from maternity leave." But Slap "did nothing" in response.

Moreover, Osborne had sought legal counsel before she sent her letter. She presented email and other evidence that she hired an attorney in December 2019, who then sent a litigation hold letter to defendants' counsel in January 2020. Osborne filed charges of harassment and retaliation against HAG and Slap with the DFEH, The Court stated that the fact that she filed the DFEH complaint and the lawsuit here less than three months after sending the HR letter further supported her assertion that she was contemplating litigation when she sent the letter.

The Court concluded that the undisputed evidence demonstrated that the HR letter was protected by the litigation privilege as a matter of law, and therefore Slap could not prevail on the merits of his tort claims against Osborne based on statements made in that letter. Because this prevented Slap from meeting the second step of the anti-SLAPP analysis, the Court affirmed.

MISCELLANEOUS

Transferring to a different county's probation department was not a factual basis for modifying probation to include drug- and alcohol-related conditions.

People v. Rogers, 2024 Cal. App. LEXIS 673 (4th. Dist. Oct. 25, 2024)

Facts: In September 2022, Charles Rogers pled guilty to inflicting corporal injury resulting in a traumatic condition. The trial court sentenced Rogers to 180 days in county jail with a suspended sentence of four years in prison, in accordance with the terms of the plea agreement. The trial court placed him on felony probation for a period of three years, under specified conditions.

He subsequently requested that his case be transferred from the Riverside County to San Bernardino County, where he resided. In June 2023, the Riverside County Superior Court granted the transfer to San Bernardino County, and ordered Rogers to report to the San Bernardino County Probation Department within 30 days. The court did not order Rogers's probation conditions modified or set a further hearing for modification.

The San Bernardino County Probation Department filed a report recommending the imposition of additional drug and alcohol-related probation conditions. The San Bernardino trial court held a probation modification hearing. Appointed defense counsel asserted that the only circumstance that had changed was where Rogers was reporting; thus, Rogers should simply be directed to report to the probation office. Defense counsel then objected to the recommended drug and alcohol-related conditions. The San Bernardino court modified Rogers's probation conditions to add the conditions recommended by the probation department. Rogers appealed, contending in part that the San Bernardino court lacked jurisdiction to modify his probations conditions absent a change of circumstances.

Held: The California Fourth District Court of Appeal stated that at any time during the probationary period, a trial court has the authority to modify the terms of probation.[2] However, "[a] change in circumstances is required before a court has jurisdiction to … modify probation." (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095.) As the California Supreme Court held in *In re Clark* (1959) 51 Cal.2d 838, "[a]n order modifying the terms of probation based upon the same facts as the original order granting probation is in *excess* of the jurisdiction of the court, for the reason that there is no factual basis to support it." (*Id.* at p. 840, italics added.) In this context, a "change in circumstance" requires "a fact 'not available at the time of the original order.'" (*Cookson, supra*, at p. 1095.) Thus, a modification order based upon the same facts as the original order is improper because "the court [has] reached a different conclusion based upon the same facts." (*People v. Mendoza* (6th Dist. 2009) 171 Cal.App.4th 1142, 1156.)

The Fourth District observed that the probation department in its report did not provide new facts showing a change in circumstance. The Court of Appeal found that the San Bernardino trial court's apparent deference to the probation department's recommendation was insufficient to justify the modification as there were no facts presented in the probation report or at the hearing that were not before the court at the original sentencing hearing. Because there was no change in circumstances to justify a modification, the Fourth District concluded that the trial court exceeded its jurisdiction in modifying Rogers's probation conditions.

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[2] Penal Code section 1203.3(a).

The Court of Appeal rejected the People's contention that the transfer of Rogers's probation to San Bernardino County constituted the requisite change in circumstances. The prosecution's claim that the drug- and alcohol-related conditions were related to Rogers's rehabilitation was inapposite because there was no showing that the domestic violence case that was the subject of the probationary terms was in any way related to alcohol or drug abuse.

The Fourth District Court of Appeal accordingly modified Rogers's probation by striking the drug- and alcohol-related probation conditions, and affirmed the order as modified.