



**BBK**

**BEST BEST & KRIEGER**  
ATTORNEYS AT LAW

# ANNUAL LABOR & EMPLOYMENT LAW UPDATE

December 10, 2013

©2013 Best Best & Krieger LLP

**IBBk** Labor & Employment Law



# Presenters

## New Employment Legislation



**Alison D. Alpert**  
Partner  
(619) 525-1304

## Wage and Hour Law



**Joseph T. Ortiz**  
Partner  
(951) 826-8291

## Disability Discrimination & Medical Leaves



**Lowell M. Zeta**  
Associate  
(951) 826-8236

## Discrimination, Harassment & Retaliation



**Cynthia M. Germano**  
Partner  
(951) 826-8232

## Religion in the Workplace Public Agency Cases



**Arlene Prater**  
Partner  
(619) 525-1334



# NEW Employment Legislation



# AB 11 - Expands Leave Rights

- Requires employers with 50 or more employees to:
  - Grant 14 days per year leave
  - Reserve Peace Officers and Emergency Rescue Personnel (expanded from Volunteer Firefighters)
  - Expanded to include time for fire, law enforcement or emergency rescue training



# AB 60 - Driver's License for Undocumented Immigrants

- Undocumented immigrants will be provided driver's licenses
- Cannot be used for any federal purpose - will be stamped
- Do not use for I-9 Verification



# AB 556 - Yet Another Protected Category

- RECALL – Last year the California Legislature added “Gender Identity” and “Gender Expression” as protected categories. (AB 2387)
- This year the Legislature continues its expansion of protected categories by adding Military/ Veteran Status - Caveat that we can *favor* military when otherwise required



# SB 288 - Time off For Crime Victims

- Adds protections for victims of certain crimes to attend court proceedings involving their rights
- Cannot discriminate or retaliate against a victim of serious crimes for taking time off to attend
- Victim includes person's spouse, parent, child, sibling or guardian





# SB 292 - Sexual Harassment

- Amends FEHA
- Clarifies that sexual harassment need not be based on sexual desire
- Addresses *Kelley v. Conco Co.* case
- No Surprise!



# SB 400 - Stalking Victims Get Protected Status, Too



- Expands job protections to victims of stalking- current law protects domestic violence and sexual assault victims
- Prohibits employers from terminating, discriminating, or retaliating against employees who are stalking victims
- Requires reasonable accommodations for those employees (e.g. transfer to new office or new extension number) in order to ensure the safety



# SB 496 - Whistleblower Protections

- Expands Labor Code section 1102.5
- Exempts from Tort Claim
- Protects reports of or refusal to participate in violation of local rule or regulation
- Protects employees who employer believes disclosed or may disclose alleged violations to:
  - Government or law enforcement agency
  - A person with authority over the employee
  - Or another employee who has authority to investigate, discover or correct the violation



# SB 700 - Paid Family Leave Expansion

- Expands Paid Family Leave
- Expands benefit to leave to care for seriously ill grandparent, grandchild, sibling or parent-in-law
- Not an entitlement to leave



# NEW

# Public Agency Employer Legislation



# AB 218 - Applicant Criminal History Use

- Relevant to PUBLIC employers
- Adds Section 432.9 to the Labor Code
  - Effective July 1, 2014
  - Prohibits inquiry or assessment of criminal convictions prior to assessment of meeting minimum qualifications
  - Public employers should review job applications



# AB 537 - MMBA Revisions

- Requires that a Tentative Agreement reached must be approved or rejected by governing body within 30 days of the date first considered at a noticed public meeting
- Requires that if governing body adopts TA, parties jointly prepare an MOU
- Contractual arbitration - cannot assert procedural deficiencies to avoid arbitration (i.e. missed timelines) - defenses submitted to arbitrator
- Unfair practice charge based on same conduct will be held in abeyance and dismissed upon conclusion



# AB 1181 - Union Release Time

- Expands release time
- Formal meet and confer
- Testifying or appearing as the designated representative at PERB
- Testifying or appearing as designated representative in matters before personnel or merit commission
- Review MOU for provisions on release time





# PERS Legislation

- SB 13 (urgency) clarified:
  - Initial contribution rate for new members must be agreed to through collective bargaining to exceed 50%
  - Employer may offer new defined contribution plan after 1/1/13, even if did not offer previously
  - Employers are not required to change retiree health benefits vesting schedule for employees subject to schedule before 1/1/13
  - Adds requirement that safety retirees employed without 180 day break be re-employed to perform safety work



# SB 39 - Forfeiture of Benefits for Felony Conviction

- Adds Government Code section 53244
- Local public officer convicted felony arising out of, or in performance of, official duties
- Forfeits contractual, common law, constitutional or statutory claims against local public agency employer to retirement or pension rights or benefits
- Not applied to accrued rights and benefits under public retirement system



# SB 313 - POBRA Brady List

- Prohibits agency from punitive action or denying promotion because name placed on Brady List (evidence of dishonesty or bias)
- May still take punitive action based on underlying conduct
- May not introduce evidence name on list in administrative appeals of discipline unless:
  - Prove underlying act
  - Officer found subject to punitive action based on act



# Wage and Hour Laws



# SB 7 - Prevailing Wages for Charter Cities

- Response to *State Buildings & Construction Trade Council of Cal. v. City of Vista* (2012) 54 Cal.4th 547, holding that locally funded projects not subject to state prevailing wage laws.
- Adds Section 1782 to Labor Code: Payment of prevailing wages on local charter city projects in order to qualify for state funding on future public works.



# AB 10 - Minimum Wage Increases

- California minimum wage will be raised in two steps:
  - STEP 1 – As of July 1, 2014, the min. wage will be increased to not less than \$9.00 per hour.
  - STEP 2 – As of January 1, 2016, the min. wage will be increased to not less than \$10.00 per hour.



# AB 241 - Overtime for Domestic Workers

- Enacts the “Domestic Workers Bill of Rights” – January 1, 2014
- Law requires that domestic workers who spend significant time caring for children, elderly, and disabled earn overtime:
  - For hours over 9 in a day
  - For hours over 45 in a week



# AB 263 / SB 666 - Protections for Use of Labor Code Rights

- These bills amend Labor Code section 98.6
- Written and oral complaints about wages are protected
- Employee is *not required* to exhaust remedies before lawsuit
- Rebuttable presumption that adverse action within 90 days of complaint is retaliation
- Clarification re unlawful immigration-related practices such as refusing to honor docs that appear genuine





# SB 390 - Criminal Penalty Added for Wage Withholding

- Existing law only makes it a crime for employers to fail to make agreed-upon payments for health and welfare funds, pension funds, or benefit plans
- Adds criminal designation for failure to remit *any* withholding required by local, state, or fed law



# SB 435 - Paid “Heat” Breaks

- Current OSHA regulation requires to allow “no less than five minutes at a time” to protect from overheating
- New law amends Labor Code section 226.7 to require one hour of “premium pay” for failure to provide “recovery period”



# AB 442 – Liquidated Damages for Wage Violations

- Current law authorizes the Labor Commissioner to investigate and enforce payment of wages by employers
- This bill amends Labor Code sections 1194.2 and 1197.1 to subject employers to liquidated damages in addition to criminal and civil penalties



# SB 462 - Employer Right to Attorneys' Fees



- New law makes it *harder* for employers to recover attorneys' fees for frivolous claims before the Labor Commissioner
- Amends Labor Code section 218.5 to allow attorneys' fees for defense costs if employer can prove action was brought "in bad faith"



# AB 1386 - Labor Commissioner May Issue Liens

- Amends Labor Code section 98.2
- Existing law requires Labor Commissioner to file an order, decision, or award after hearing
- New law provides lien procedure after judgment – to attach employer's real property



# NEW WAGE AND HOUR CASES



# California Courts Still Wrestling With 2011 *Wal-Mart v. Dukes*

- 2011 Case before U.S. Supreme Court held that Class Certification may not rely on statistics to express “commonality” of plaintiffs.
- *Duran (Sam) v. US Bank NA* (2012) 203 Cal.App.4th 212 (2012) – Review granted on issue to California Supreme Court.
- *Wang v. Chinese Daily* (9<sup>th</sup> Cir. 2013) 2013 US App. LEXIS 18245 – 9<sup>th</sup> Circuit remands issue to District Court.



# California Courts Still Wrestling With 2011 *AT&T v. Concepcion*

- 2011 Case before the U.S. Supreme Court held that Federal Arbitration Act preempts California law finding class action waivers unconscionable.
- *Ontiveros v. Zamora*, 2013 US Dist. LEXIS 20408:  
“There is a marked split amount California Court of Appeal as to the continuing viability of *Gentry* in light of *Concepcion*.”
- Issue now taken by California Supreme Court.





# Equitable Tolling

- *Bain v. Tax Reducers* (2013) 219 Cal.App.4<sup>th</sup> 110.
- In 2005, Bain filed a Labor Commissioner Claim for wages, interest and penalties, winning \$15,000. Settled appeal on same in 2006.
- In 2008, Bain sued for breach of settlement agreement and added Labor Code violations.
- Bain's claims were not time barred because he choose to use Labor Commissioner claim.



# PAGA Penalties Cannot Be Aggregated For Removal

- *Urbino v. Orkin Servs.* (9<sup>th</sup> Cir. 2013) 726 F.2d 1118.
- “Diversity” Jurisdiction required to remove a case to federal court requires at least \$75,000 in controversy.
- Plaintiff claimed that – as a representative of 800 other employees – the wage violations amounted to approximately \$400,000. His individual claims were worth \$11,000.
- Court held that PAGA claims could not be aggregated.



# May Pursue Class Action Under FLSA & State Law

- *Busk v. Integrity Staffing Sol.* (9<sup>th</sup> Cir. 2013) 713 F.3d 525.
- Plaintiffs brought class action in federal forum for FLSA violations and for state law wage violations.
- Court held that the Federal “Opt-In” Class Action procedure did not preclude the state “Opt-Out” Class Action procedure.



# Preponderance of Evidence for Federal Removal

- *Rodriguez v. AT&T* (9<sup>th</sup> Cir. 2013) 2013 U.S. App. LEXIS 17851.
- Wage-and-hour class action filed in State Court.
- AT&T removed the case to federal court under the Class Action Fairness Act (CAFA), which requires at least \$5 million in controversy.
- Plaintiff purported to waive any claim for more than \$5 million for class claims.
- Preponderance of the evidence used to establish value of claims.



# Harassment / Retaliation



# *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283

- Female employee files lawsuit against employer for sexual harassment and retaliation
- As to sexual harassment claim, Court held that evidence was insufficient to state a claim based on hostile work environment
  - Comments about women's bodies made on at most 9 and possibly as few as 5 occasions
  - Comments involved discussion of other women's bodies outside their presence
  - Employee did not claim that any sexual comment or conduct was directed at her



# *McCoy v. Pacific Maritime Assn. (Cont'd)*

- On retaliation claim, Court held there was sufficient evidence to support verdict in employee's favor
  - Management revealed details of a confidential settlement agreement to co-workers upon whom employee relied for training necessary to advance, who then harassed her.
  - Employee's continued isolation and ostracism established retaliation claim.
  - Evidence of retaliation against two other employees was improperly excluded; trial court should have first determined whether experience of other employees was sufficiently similar to that of the plaintiff.



# *Hatai v. Department of Transportation* (2013) 214 Cal.App.4th 1287

- Employee sues employer and supervisor claiming discrimination based on his Asian ancestry
- Employee could not prove discrimination by showing that supervisor discriminated against any employee not of Arab descent
- But employee allowed to present “me too” evidence of other employees of Asian descent subjected to similar discrimination
  - Admissibility of “me too” evidence was based on manner in which discrimination claim was originally pled





# *McGrory v. Applied Signal Technology* (2013) 212 Cal.App.4th 1510

- At-will supervisory employee McGrory is accused of discriminating against subordinate based on her gender and sexual orientation
- Employer retains outside investigator, who determines McGrory did not engage in discrimination, but finds
  - McGrory had been uncooperative and untruthful during investigation, and
  - McGrory had violated sexual harassment policy by making jokes based on sex and gender



## *McGrory v. Applied Signal Technology (Cont'd)*

- Employer terminates McGrory not based on original complaint, but because of violation of harassment policy, conduct during investigation and potential liability created by his behavior
- McGrory sues, claiming pretext based on purported investigator anti-male bias and because employer offered different reasons for his termination



## *McGrory v. Applied Signal Technology (Cont'd)*

- Judgment in favor of employer:
  - Anti-male discrimination claim unsupported by any evidence
  - Discriminatory motive could not be inferred simply because employer had different reasons for termination
  - Public policy was not violated by termination based on McGrory's conduct during investigation
    - Public policy does not protect deceptive activity during internal investigation



## *Vance v. Ball State University* (2013) 133 S.Ct. 2434

- Vance, who worked as a catering assistant, sued her employer, the University, alleging that a fellow employee Davis, who worked as a catering specialist, created a racially hostile work environment in violation of Title VII
- The issue was whether Davis was Vance's supervisor, in which case the University could be held vicariously liable for Davis' alleged racial harassment.



## *Vance v. Ball State University (Cont'd)*

- Supreme Court held that an employee is a “supervisor” for purposes of vicarious liability under Title VII only if she is empowered by the employer to take tangible employment actions against the victim
  - “Tangible employment actions” = power to hire, fire, demote, promote, transfer, discipline



# Disability Discrimination and Medical Leaves



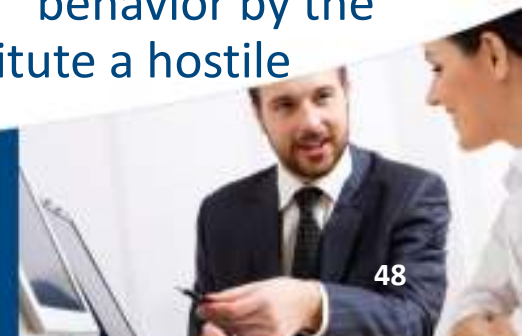
# California Disability & Pregnancy Disability Regulations

- Expanded Definition of Reasonable Accommodation
- Expanded Definition of Pregnancy-Related Conditions
- Expanded Definition of Healthcare Provider
- Four-Month Leave Period and Calculation of Use of Intermittent Leave
- Clarification of Rights Related to "Pregnancy" vs. "Perceived Pregnancy"
- Notice and Medical Certification
- Reinstatement Rights



# *Lawler v. Montblanc North America, LLC* (9th Cir. 2013) 704 F.3d 1235

- Lawler filed suit against her employer and its president and CEO for disability discrimination, retaliation, and harassment under FEHA. The District Court granted summary judgment for the defendants.
- The Ninth Circuit affirmed:
  - Failed to establish a prima facie case of disability discrimination because she was not “competently performing her position.”
  - Inability to perform the essential functions of her position constituted a legitimate reason for her termination and Lawler failed to provide “specific and substantial” evidence that this reason was pretextual.
  - Single incident of “gruff,” “abrupt,” and “intimidating” behavior by the employer’s CEO was not “sufficiently severe to constitute a hostile working environment.”





# *White v. City of Pasadena* (9th Cir. 2012) 671 F.3d 918

- Plaintiff White, a City of Pasadena Police Officer, filed three lawsuits against the city over a period of three years:
  - The first (White I) alleged disability discrimination because the city fired her because she had associated with a known drug dealer. Was reinstated on statute of limitations grounds but, on appeal, the lawsuit was decided in favor of the city.
  - Before White I went to trial, White was again fired after an alleged suicide attempt about which the city determined she had made false statements to law enforcement. She pursued an administrative appeal of her second firing (White II), with the arbitrator finding in her favor, but the city manager terminated her anyway. The Court of Appeal found in favor of the City, and White did not seek further review.
  - While White I was on appeal and the proceedings in White II were still pending, White filed another lawsuit against the City (White III), alleging a pattern of discrimination and harassment by the city because of her disability.



## *White v. City of Pasadena* (9th Cir. 2012) 671 F.3d 918 (Cont'd)

- Under 28 U.S.C. section 1738, it was obligated to apply California's principles of issue and claim preclusion, and in doing so, it found that White I precluded White from arguing that the city had harassed or discriminated against her based on perceived disabilities and White II precluded her from arguing that her termination was a pretext for retaliation.



## *Furtado v. State Personnel Board* (2013) 212 Cal.App.4th 729

- California State Personnel Board's decision that the Department had reasonably determined that Furtado was unable to perform the essential functions of his correctional lieutenant position even with reasonable accommodation because of his inability to use a baton, which was required by all correctional lieutenants.
- The department acted reasonably in demoting Furtado to an available non-peace officer position for which he was qualified and could perform the essential duties.



## *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962

- Evidence supported the trial court's finding that the strenuous physical listed by the SFPD on the "Sworn Members Essential Job Functions" list were essential functions - even for administrative positions - because SFPD had a legitimate need to be able to deploy administrative officers in the event of emergencies and other mass mobilizations.



## *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635

- No violations of the Michelle Maykin Memorial Donation Protection Act (“DPA”) because it was not in existence at the time of Rope’s termination and that the DPA cannot be applied retroactively.
- A mere request — or even repeated requests — for an accommodation, without more, constitutes a protected activity sufficient to support a claim for retaliation in violation of FEHA.
- Claims for direct disability discrimination under FEHA fail because Rope had not established that he is himself physically disabled, but rather claimed that he anticipated becoming disabled for some time after the organ donation which is insufficient.



## *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635 (Cont'd)

- Claims for perceived disability discrimination failed because Rope was not perceived as or treated by Auto-Chlor as having, or having had, a “physical disability” or as having, or having had, a disease, disorder, condition, or health impairment that might become a “physical disability.”
- Trial court erred in sustaining the demurrer to the association-based disability discrimination claim because Rope had plead facts sufficient to support the claim based on his relationship or association with his physically disabled sister.
- Rope similarly plead facts sufficient to support a claim that Auto-Chlor violated FEHA by failing to take the necessary steps to provide an environment free from discrimination, because it is dependent on a viable claim for discrimination and Rope’s FEHA claim for associational disability discrimination survived.



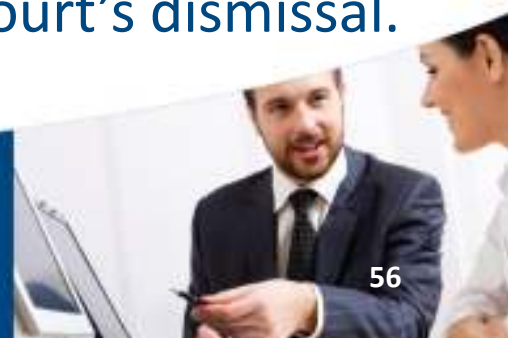
*Alamo v. Practice Management Information Corp.*  
(2013) 219 Cal.App.4th 466

- Employee must demonstrate that unlawful discrimination was a **substantial motivating factor** in a challenged adverse employment action.
- “Requiring the plaintiff to show that discrimination was a substantial motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision.”



*Sanchez v. Swissport, Inc.*  
(2013) 213 Cal.App.4th 1331

- Pregnancy Disability Leave Law augments, and does not replace or supplant, the other requirements under FEHA, specifically the requirement that employers engage in the interactive process and provide reasonable accommodations of a disability as long as the accommodation does not create an undue hardship.
- “A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA.” The Court of Appeal reversed the trial court’s dismissal.





## *Smith v. Clark County School District* (9th Cir. 2013) 727 F.3d 95

- Smith was a “qualified individual” under the ADA.
- Smith’s claims for FMLA leave, private insurance benefits, and PERS disability retirement did not inherently conflict with her ADA claim because they did not account for her ability to work with reasonable accommodation.
- Smith had offered sufficient explanations for her inconsistent statements in her prior benefit applications.



## *Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236

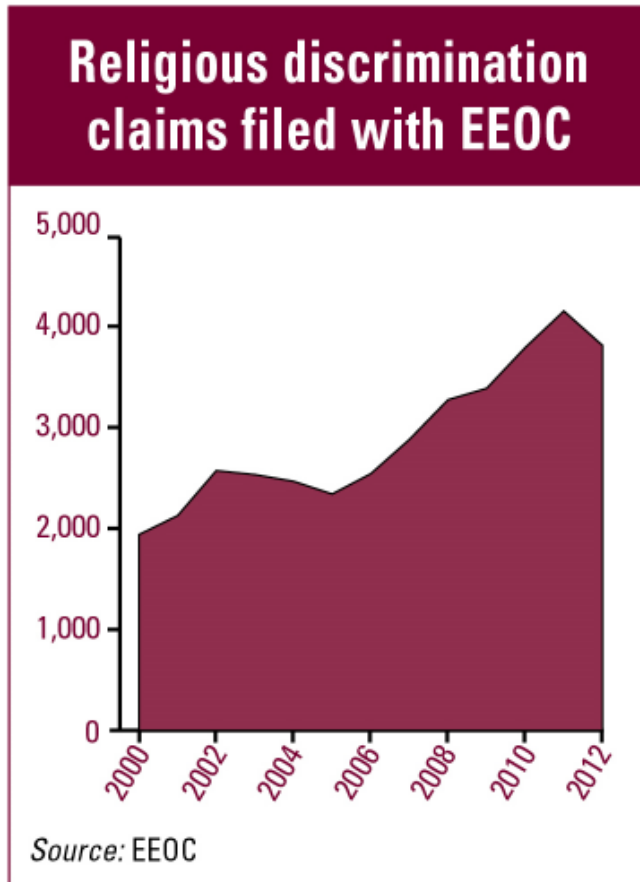
- Employer only required to respond to employee's CFRA leave within 10 days, not approve it.
- Defendant did not misrepresent by deed that plaintiff's leave application was approved and did not remain silent when it had a duty to speak.



# Religious Discrimination, Harassment, and Retaliation in the Workplace



# Claims of Harassment and Discrimination Based on Religion



- Increase in DFEH and EEOC claims and litigation.
  - Most cases involve requests for religious accommodation, where demands of religion conflict with employer policies on scheduling, dress, grooming, duties and other matters.



# Federal Law

- Title VII forbids discrimination based on race, color, gender, national origin, and religion, circularly defined to include all aspects of religious belief, observance, and practice.
- Employers must reasonably accommodate sincere religious practices, unless doing so would create undue hardship.
  - Duty reflects basic discrimination law.



# AB 1964 Religious Discrimination Amendments to the FEHA

## *Workplace Religious Freedom Act (“WRFA”)*

Effective January 1, 2013, FEHA was amended to:

- Clarify that an employer’s obligation to accommodate employees’ religious creed, beliefs or observances includes accommodating religious dress and grooming practices, as broadly defined. (Govt. Code Sec 12926, subd. (p).)

Govt. Code Sec 12926 (p): "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. "Religious dress practice" shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed.

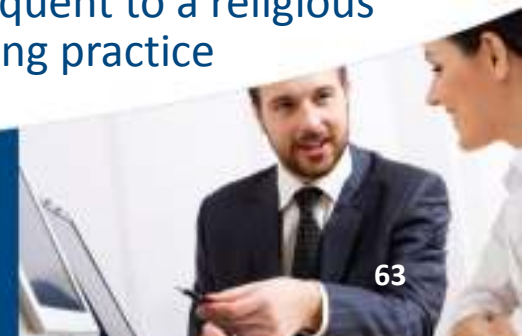
"Religious grooming practice" shall be construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed.



# WRFA...continued

- Clarify that the standard for determining whether a religious accommodation poses an undue hardship is the same standard used for evaluating disability accommodations.

Govt. Code Sec 12940 (1): Employer cannot discriminate because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (t) of Section 12926, on the conduct of the business of the employer. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (p) of Section 12926.



# WRFA...continued

Govt. Code Sec 12926(t): "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness, administrative, or fiscal relationship of the facility or facilities.





# WRFA...continued

- State expressly that an accommodation is not reasonable if it requires segregation of an employee from other employees or the general public.

Govt. Code Sec 19240 (I)(2): An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.

- Provide that a religious accommodation is not required if it violates the civil rights of another. Govt. Code Sec 19240(I)(3).



# Burdens of Proof

- Two-part burden-shifting test for religious accommodation claims.
- Employee must show:
  - Sincerely held religious belief and practice conflicts with employment duty; and
  - Employer was informed of the belief and the conflict and the belief conflicted with an employment requirement; or
  - Employer took adverse action against employee because of the conflict.
- Employer must then show:
  - One or more elements of employee's prima facie case not true; or
  - Employer offered a reasonable accommodation; or
  - Employer engaged in good faith to explore accommodation of religious practices and could not reasonably accommodate without undue hardship.





# What is a “Religion”



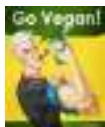
- Title VII: Moral or ethical beliefs as to what is right and wrong that are sincerely held with the strength of traditional religious views. 29 C.F.R. § 1605.1.
- FEHA: Any traditionally recognized religion as well as beliefs, observations, or practices that an individual sincerely holds and that occupy in the individual’s life a place of importance parallel to that of traditionally recognized religions. Cal. Code Regs., tit. 2, § 7293.1.

- Some non-traditional faiths can qualify:

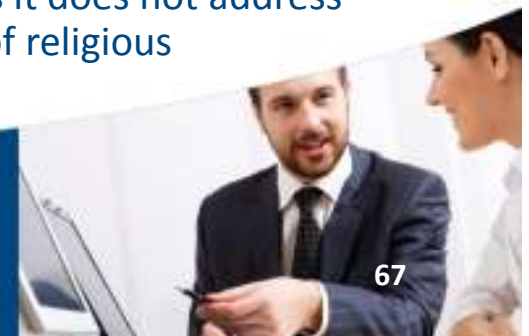


- World Church of the Creator (preaching white supremacy) *Peterson v. Wilmur Communications, Inc.* (E.D. Wis. 2002) 205 F. Supp. 2d 1014.
- Wiccan (assuming Wiccan qualifies as Title VII religion) *Benz v. Rogers Memorial Hosp., Inc.* (E.D. Wis. 2006) 2006 WL 314407.

- While other well-established belief systems may not qualify:

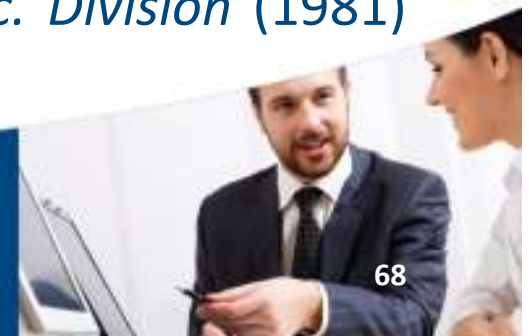


- Veganism (veganism is personal philosophy, not religious creed, as it does not address purpose of life, derive from ultimate faith, or bear external signs of religious organization) *Friedman v. SCPMG* (2002) 102 Cal.App.4th 39.



# What is a “Sincere Belief”

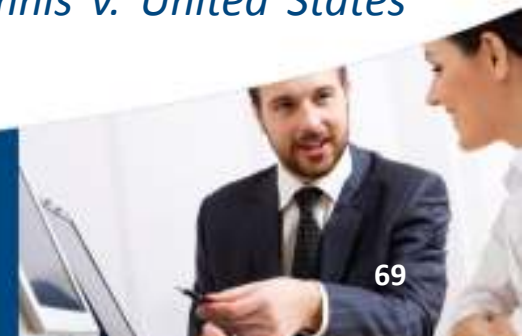
- “[E]mployee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy.” *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir. 1998) 859 F.2d 610.
- Catholic was sincere about attending Sunday mass even if she could not identify “all of the elements of a Catholic mass.”  
*Pozo v. J & J Hotel Co.* 2007 WL 1376403 18.
- Religious group need not accept belief espoused by the employee.  
*Thomas v. Review Bd. Of Indiana Employment Sec. Division* (1981) 450 U.S. 707.



## Employers can inquire into sincerity before deciding whether to grant religious accommodation:



- Employer could see if employee really attended synagogue services she cited as reason to resist schedule change because her conduct led employer to doubt this. *Bind v. City of New York* (S.D.N.Y. 2011) U.S. Dist. LEXIS 11369 .
- EEOC Compliance Manual: If accommodation request gives insufficient information, employer with good-faith doubt can make “limited inquiry” into whether the request reflects a religious belief or practice that requires accommodation.
- Postal clerk fired because she refused to process Selective Service System registration forms, contending that she was a conscientious objector based on her Quaker upbringing, even though she was no longer a member of any Quaker Society Meeting. Employee’s continuing belief in the Quaker religion’s “Peace Testimony” and her willingness to jeopardize her job entitled her to claim that she had been discriminated against on the basis of a bona fide religious belief and for the court to not question the sincerity of her belief. *McGinnis v. United States Postal Service* (N.D. Cal. 1980) 512 F.Supp. 517.



# Reasonable Accommodations

- See Requirements of WRFA: undue hardship is a “significant difficulty or expense” when considered under the Government Code section 12926(t) factors.
- Examples of Reasonable Accommodation for Religious Observances Conflicting with Work:
  - observing Sabbath;
  - praying or other religious activity during work hours;
  - missing work to mourn for deceased relative;
  - refusing to submit to medical exam;
  - refusing to join union or pay union dues;
  - adopting certain hair style or beard;
  - wearing certain clothing or head coverings; and
  - displaying certain jewelry, objects, or tattoos.



# Reasonable Accommodation – Notice Required

- Employee is required to tell employer that a work requirement is violating their religious beliefs. Notice can be minimal.
- Once employee establishes that the employer is aware of the employee’s “sincere religious belief” and that that belief or observance conflicts with an employment requirement as under Title VII, the employer must initiate good-faith efforts to accommodate the belief or observance. *California Fair Employment and Housing Commission v. Gemini Aluminum Corp.* (2003) 122 Cal.App.4th 1004.
- Employee objecting to drug screening in form of saliva test instead of blood or hair or urine test (based on tenet of “Santeria” religion) gave sufficient notice of religious conflict and proposed accommodation. *EEOC v. GKN Driveline N. Am.* (2010) U.S. Dist. LEXIS 129815.



# Reasonable Accommodation

- Once employee establishes that the employer is aware of the employee's "sincere religious belief" and that that belief or observance conflicts with an employment requirement as under Title VII, the employer must initiate good-faith efforts to accommodate the belief or observance. *California Fair Employment and Housing Commission v. Gemini Aluminum Corp.* (2003) 122 Cal.App.4th 1004.
- "It is well settled an individual's religious beliefs must be accommodated even where it means making an exception to a rule which is reasonably applied to other individuals with different beliefs." *Best v. California Apprenticeship Council* (1984) 161 Cal.App.3d 626.
- Where the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so. *EEOC v. Townley Eng'g & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 625; *Opuku-Boateng v. State of Cal.* (9th Cir. 1996) 95 F.3d 1461, 1467.
- Employee not entitled to accommodation of their choice.





# Undue Hardship

- California Employers must resolve conflicts between employee's religious practice and employer's policy under the same standards as for accommodating disabilities.
- Accommodation causes "undue hardship" only if it requires significant difficulty or expense when considered in light of the five factors used in disability accommodation analysis.



# Undue Hardship...continued

- Burden is on the employer to show it cannot accommodate the employee without undue hardship.
- Examples:
  - Job restructuring, reassignment, modification of practices, time off, flexible schedules, lateral transfers.
  - Violation of the law or civil rights of another is not a reasonable accommodation.
  - Violation of a Collective Bargaining Agreement is an undue hardship, but seniority system is not complete bar to a reasonable accommodation. *Balint v. Carson City* (9th Cir. 1999) 180 F.3d 1047.



# Sample Reasonable Accommodation Cases

Proselytizing – generally need not be accommodated:

- Employer need not allow employee to discuss religion with clients, display religious items in cubicle, and use conference room for prayer meetings. *Berry v. Dep't of Social Services* (9th Cir. 2006) 447 F.3d 642.
- Employer need not permit evangelical employee to post messages castigating gay co-workers, and need not exclude sexual orientation from workplace diversity programs. *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599.



## Sabbath – depends on the facts:

- *EEOC v. Rent-A-Center, Inc.* (D.D.C. 2013).
  - Rent-A-Center, Inc. had no duty to accommodate store manager who requested Saturdays off to practice his faith as a Seventh Day Adventist, because requiring it to give every Saturday off would create undue hardship because (i) store manager position was critically important, (ii) Saturdays were central to weekly cycle, and (iii) company had policy requiring all store managers to work on Saturdays.
- *EEOC v. Maita Chevrolet Geo.*
  - A Seventh-Day Adventist, worked as a car salesman from April 2005 to May 2007. A key tenet of his faith is to observe the Sabbath by refraining from secular work from sundown Friday to sundown Saturday. The company persistently scheduled him to work shifts during his Sabbath despite numerous requests from employee and his pastor explaining the requirements of their religion. Employer paid \$158,000 settlement.



- *EEOC v. CONSOL Energy, Inc. and Consolidation Coal Company* (2013).
  - EEOC Claims that mining companies violated federal law when they forced a long-time employee to retire because they refused to accommodate his religious belief that use of a biometric hand scanner violated his sincerely held religious beliefs as an Evangelical Christian.
  - Mining companies refused to consider alternate means of tracking time and attendance, such as submitting manual time records, even though they made this exception for two employees missing fingers.



# Examples of Dress and Grooming Accommodations



Khimar



Yarmulke



Turban



Hijab



Beard



Tattoos



Piercings

## See, Requirements of WFRA:

Specifically provides that religious observations include dress practices (head or face coverings, jewelry, artifacts, etc.) and grooming practices (head, facial and body hair).



# Dress and Grooming Accommodations

## Safety Issues

- Security concerns for prison company meant that allowing khimar – traditional Muslim headcovering – as exception to no-headgear policy would create undue hardship, in that khimars could be used to smuggle contraband and as a weapon to attack a prison employee. *EEOC v. The Geo Group* (3d Cir. 2010) 616 F.3d 265.
- Upholding firing of Pentecostal detention officer whose faith forbade her to wear pants; permitting skirts as exception to pants-only policy would pose “risks” to safety and security, creating undue hardship. *Finnie v. Mississippi* (N.D. Miss. 2012) U.S. Dist. LEXIS 6679.



# Dress Accommodations

- Grant of Abercrombie's motion for summary judgment upheld on appeal because the job applicant never informed Abercrombie prior to its hiring decision that she wore her headscarf or "hijab" for religious reasons and that she needed an accommodation for that practice, due to a conflict between the practice and Abercrombie's clothing policy. *EEOC v. Abercrombie & Fitch Stores* (10<sup>th</sup> Cir. 2013) U.S.App.LEXIS 20028.
- Federal judge ruling that Abercrombie discriminated against a Muslim employee when it fired her from her "impact associate" (stockroom employee) position solely for refusing to remove her hijab; company failed to accommodate employee's wearing of a hijab at work since Abercrombie could not show that the accommodation would create an undue hardship on it). *EEOC v. Abercrombie & Fitch Stores (Khan)* (N.D. Cal. 2013) U.S. Dist. LEXIS 125628.
- Abercrombie & Fitch agreed to pay \$71,000 and to change its policies to settle two separate religious discrimination lawsuits on behalf of Muslim teens wearing hijabs (religious headscarves). This settlement follows a ruling finding Abercrombie liable for religious discrimination in one case, and an April 2013 ruling dismissing its undue hardship claims in another case.





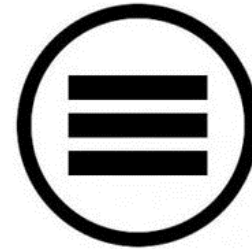
# Dress Practices Accommodation

## Tattoos, Piercings and Jewelry

- Member of Church of Body Modification refused to cover multiple facial piercings, in violation of personal appearance policy. Proposed accommodation – exemption from appearance policy – would pose undue hardship on Costco because:

- Costco had legitimate interest in maintaining professional image.
- losing control of public image could cause economic costs.

*Cloutier v. Costco Wholesale* (1st Cir. 2004) 390 F.3d 126.



- Employee who practiced Kemeticism, a religion with roots in ancient Egypt or “Kemet,” refused to cover his tattoos which encircled his wrists. Court denies summary judgment to the employer because there was no evidence that any customers complained about his tattoos, or any other employee’s tattoos; no evidence that visible tattoos are inconsistent with a family-oriented and kid-friendly image; the tattoos were written in ancient Coptic; ancient Coptic unlikely to offend customers. *EEOC v. Red Robin Gourmet* (W.D. Wash. 2005) U.S. Dist. LEXIS 36219.



# Grooming Practices Accommodation

- Rejecting accommodation claim by Rastafarian correction officer, because employer did permit him to wear a “neat facial beard”). *Stanley v. State of California* (E.D. Cal. 2012) U.S. Dist. LEXIS 178946.
- Rejecting accommodation claim by Sikh to wear beard where company policy reflected need to wear respirator with gas-tight face seal because of potential exposure to toxic gases. *Bahtia v. Chevron U.S.A.* (9th Cir. 1984) 734 F.2d 1382.



# Questions?



# Public Agency Cases



# Is It Citizen Speech?

## *Dahlia v. Rodriguez*

(9th Cir. Aug 21, 2013) 2013 U.S. App. LEXIS 17489

- Requires close evaluation to determine official duties
- When an employee speaks outside of the chain of command, it is UNLIKELY speech pursuant to official duties
- Subject Matter is HIGHLY RELEVANT
- Routine Report v. Raising Broad Concerns



# Union Speech

## *Ellins v. City of Sierra Madre*

(9th Cir. 2013) 710 F.3d 1049

- Police officer does not act in furtherance of his public duties when speaking as a representative of the police union



# *Bland v. Roberts*

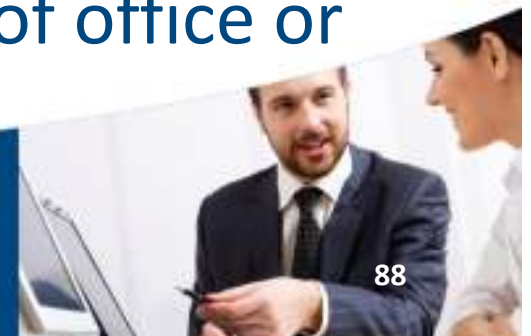
(4th Cir. 2013) 730 F.3d 368

- Not a California Case
- Deputy Sheriffs
- Failed to reappoint based on support for opposition to Sheriff
- “Liking” on Facebook is Speech
- Conveyed Support
- Equivalent of Displaying a Political Sign



## *Bland v. Roberts* (Cont'd)

- Clearly on a Matter of Public Concern
- Employee's interest in expressing support outweighed Sheriff's interest in providing effective and efficient services to the public
- Political speech highest protection
- Sheriff's claim for need of harmony and discipline unsupported, no record of disruption of office or interference with efficiency





# *County of Santa Clara*

## (2013) PERB Decision No. 2321-M

- An employer violates the duty to bargain in good faith when it fails to afford a union reasonable advanced notice and an opportunity to bargain before it either reaches a firm decision to change a policy within the scope of representation or implements a changed policy not within the scope of representation but having a foreseeable effect upon matters within the scope of representation.
- PERB expressly overruled prior decisions and held that, if the employer implements a managerial decision without giving the union reasonable notice and an opportunity to bargain effects, the union may now proceed to file a PERB charge even if it did not first demand to bargain effects.
- However, when a union receives advance notice from an employer that it intends to implement a decision within its managerial prerogative, but the decision has foreseeable effects on negotiable terms and conditions of employment, the union must demand to bargain the effects or risk waiving the right to do so.



# Scope of Fact Finding

## *San Diego Housing Commission v. PERB*

(San Diego County Superior Court Case No. 37-2012-00087278)

- An impasse in bargaining over layoff effects is subject to AB 646 and an employer, subject to limited exceptions, may not implement a layoff until all impasse procedures, including factfinding, are concluded.

## *County of Riverside v. PERB (SEIU Local 721)*

(Riverside County Superior Court Case No. RIC 1305661)

- Court held that PERB's interpretation that the post-impasse factfinding procedures of AB 646 apply to disputes that arise from negotiations of single meet and confer issues arising during the tenure of a valid MOU is "clearly erroneous."
- Court granted County's request for an injunction, which includes orders prohibiting PERB from granting any requests for MMBA factfinding relating to a dispute that arises after negotiations of a single meet and confer issue and which does not arise from negotiations after impasse after collective bargaining for a new or successor MOU.
- **These cases are not final and will likely be appealed. Until there is a final published appellate decision, this issue will remain uncertain.**



## *Rio Hondo Community College District* (2013) PERB Decision No. 2313

- Refusing an effects bargaining demand without first attempting to clarify ambiguities and/or whether matters proposed for bargaining fall within the scope of representation, violates the duty to bargain in good faith.
- Union's demand to bargain over the effects of a decision was sufficient because it: (a) clearly identified negotiable areas of impact within the scope of representation and (b) clearly indicated a desire to bargain over the effects of the decision rather than the decision itself.



## *City of Long Beach* (2013) PERB Decision No.2296-M

- A public agency cannot unilaterally implement furloughs because they primarily effect wages and hours and therefore are generally within the scope of representation and subject to bargaining.
- PERB adopts the Educational Employment Relations Act definition of “impasse”
  - “the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile.”



## *City of Los Angeles v. Superior Court (Engineers & Architects Association)* (2013) 56 Cal.4th 1086

- Arbitration of furlough dispute did not involve unlawful delegation of City Council's discretionary authority.
- The City is contractually obligated to arbitrate the employee furloughs dispute because it involved the interpretation of the MOU.



## *Poole v. Orange County Fire Authority* (2013) 221 Cal.App.4th 155

- Under the Firefighters Procedural Bill of Rights, firefighters are entitled to review and respond to adverse comments in a captain's daily logs if they are used for personnel purposes, even if the logs are not kept in the personnel file.



*Mooney v. County of Orange*  
(2013) 212 Cal.App.4th 865

- For the purpose of retirement law an employee is not “dismissed” or “terminated” if they are on disability leave.
- “Dismissed” in Government Code section 31725, and “separated” in Government Code section 31721, subdivision (a), share the same meaning.



## Estrada v. City of Los Angeles (2013) 218 Cal.App.4th 143

- Volunteers are not "employees" under FEHA.
- City's policy decision to extend workers' compensation benefits to volunteer reserve officers does not transform the volunteers' status to that of "employee" for purposes of FEHA.





## *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489

- Ethical wall is no longer a sufficient safeguard to allow attorneys from the same firm to act as advisor and advocate in contested administrative matter.
- When a partner in a law firm represents a city department at an advisory arbitration proceeding, another partner from that firm may not represent the public agency in determining whether to confirm or reject the arbitration decision.
- Partners have a fiduciary duty to other partners in the same firm.



# Additional Questions?

