Refined Management Practices Through Recent Court Decisions

A Tale of ~~Three~~ Four Cases

By Jeffrey M. Hausman

White v. County of Los Angeles

225 Cal.App.4th 690 (2014) (a published case)

Factual Background

- Susan White was a District Attorney Investigator, a peace officer
- Psychological problems: Depression, aberrant behavior
- White lost her composure on the witness stand in a criminal case
- Dangerous Decisions -
  - Training: Pointing fake weapon at team members
  - Failure to follow directions during "low key" service of search warrant; driving from staging area with siren "on"
  - On another occasion, scaling a fence without communicating; creating the potential for crossfire

Facts: Applying For FMLA

- White applied for and received FMLA benefits
- White's physician requested multiple extensions of White's leave period
- White's 12-week leave period ended August 5, 2011
- White's physician extended White's leave to August 29 – past White's 12-week FMLA period

Facts: White’s Return to Work

- White returned to work – immediately placed on administrative leave
- OHP consented to medical reevaluation (i.e. Fitness for Duty Examination, per CSR 20.04)
- White refused to appear at FFDE; filed for injunction in the Superior Court
- White’s contention: Under the FMLA the County was obligated to honor White’s physician’s return to work order, and was barred from conducting an FFDE
- Superior Court agreed with White and issued an injunction

Court of Appeal: REVERSED

- According to the Court:
  - *<u>During leave</u>*, the employer may obtain a second opinion only to determine if the employee has a condition requiring FMLA leave. The requirements for this are technical and set forth by statute.
  - Otherwise, the employer has no right to refuse to return the employee to work after the leave period
  - *<u>After returning the employee to work</u>*, the employer may conduct an FFDE if it is consistent with ADA requirements
  - The ADA requirements are:
    - (1) The FFDE must be job-related, and
    - (2) The FFDE must be consistent with business necessity

Core Quote from the White Decision

"[A] bright line exists at the employee's return to work. Before the return to work, the employer must accept the employee's physician's certification and return the employee to employment; after the return to employment, the FMLA protections no longer apply, and the employer may require a FFDE consistent with the ADA."

White v. County of Los Angeles, 225 Cal.App.4th 690, 704 (2014).

2nd Core Quote in the White Decision

There is a liberalized ground for ordering a peace officer employee to an FFDE:

"[I]t is appropriate, and not in violation of the ADA, for a peace officer with mental health issues to be ordered to a FFDE. It is unnecessary for the employer to establish that the employee's job performance has actually suffered in order to require a FFDE, when the employee in question is a peace officer who carries a weapon."

White v. County of Los Angeles, 225 Cal.App.4th 690, 707 (2014).

Lessons From White:

- The employee should be put back to paid status before considering the FFDE (i.e., medical reevaluation)
- The FFDE must be consistent with ADA requirements
- Peace officers are in a special category, and…
- Counsel's opinion : The insulation of a "second opinion" never hurts. The County's system of allowing the Department with OHP's consent to order the FFDE in certain circumstances per Civil Service Rule 9.07(B) added to the County's credibility in this case.
- As a side note, the Court never dealt with the issue that White had exceed her FMLA leave and was no longer protected.

County of Los Angeles v. E.R.C.O.M.

2015 W.L. 140031 (2015) (an unpublished case)

Facts: Background

- In 2002 the Board of Supervisors adopted a “Strategic Plan” to increase productivity
- DA began developing a web-based PE system to replace “pencil and paper” form The DA contended that implementation occurred in January 2007
- Notice was given to DDAs in February 2007
- The DA’s representatives met with the ADDA Board to introduce the system, notwithstanding resistance
- ERCOM certified the Association of Deputy District Attorneys (ADDA) on March 24, 2007.
- The ADDA objected and filed a UFC with ERCOM

Facts: ERCOM and Superior Court Decisions

- ERCOM ruled (after a very lengthy hearing that lasted about three weeks):
  - The DA made material changes to the existing PE system affecting DDAs I-IV, and failed to provide notice or any opportunity to bargain
  - The DA had a duty to bargain; the DA “changed” Civil Service Rule 20 governing PEs
- Superior Court REVERSED:
  - The court determined that implementation of the new system occurred at the beginning of the rating system when the new “Work plan” was issued
  - All of this occurred before the ADDA’s certification

Court of Appeal: AFFIRMED on the issue of jurisdiction

- **Procedurally**: The ADDA claimed or the first time that the initial petition attacking ERCOM's decision should have been filed in the Court of Appeal rather than the Superior Court. (*Singletary v. Local 18 of I.B.E.W, 212 Cal.App.4th 34).*
- The Court of Appeal ruled that Government Code 3509.5 only applies to the decisions of the California Public Employment Relations Board (PERB) and not ERCOM. The County filed the petition in the proper court.

Court of Appeal: Also AFFIRMED on the Substance

- The Court of Appeal changed the formulation stating that an unfair labor practices claim arises when the employees/union members ***receive notice of the employer's decision, not when it is "implemented"***
- The Court relied upon federal decisions in this groundbreaking decision
- Therefore – In this case the ADDA's "unfair" practices claim arouse even earlier than previously believed, well before the date the ADDA was certified as the deputy district attorneys' exclusive bargaining representative

Core Quote from the County v. ERCOM Decision:

"Here the DAO indisputably made the decision to implement the new performance evaluation system, and the ADDA had actual or constructive notice of the DAO's decision before ADDA was certified. It was at that time any duty to bargain over the decision or the impacts of the decision attached. It was not, as the hearing officer concluded, during the implementation of the prior decision to replace the old paper evaluation form with a new performance evaluation system."

County of Los Angeles v. E.R.C.O.M.

Lesson from the ERCOM case: “When a tree falls in the middle of the forest, who cares?”

- The Court of Appeal significantly decided that a duty to bargain under a collective bargaining agreement arises from the date the employee receives notice of the employer’s decision
- . . . and the Court of Appeal made a significant procedural decision by determining that ERCOM decisions must be first attacked in the Superior Court
- BUT, an unpublished decision has no legal effect on future cases—so the Singletary dilemma persists—a trap for challenges to ERCOM decisions.

Hudson v. County of Los Angeles

232 Cal.App.4th 392 (2014) (a published case)

Setting the Table: The applicable law ignored by the Court of Appeal in this factually convoluted matter…

"Permanent incapacity for the performance of duty shall in all cases be determined by the board."

Government Code §31725

Facts: Background

Convoluted Factual Scenario…

- January 2005: Sheriff discharged Hudson, a deputy sheriff, for misconduct
- May 4, 2005: LACERA determined that Hudson was permanently disabled from her position (non-service connected)
- December 2006: Hudson withdrew her retirement contributions from LACERA
- HO first recommended to dismiss case under Zuniga, Commission reversed and sent back to HO
- February 6, 2008: The Commission reduced the discharge to a 5-day suspension

Facts: Background (cont'd)

- When Hudson was not returned to work due to LACERA finding of disability, she filed a second appeal to the Commission regarding her medical release
- According to Hudson there was an "unwritten" settlement agreement between the County and Hudson of August 5, 2008, where the parties supposedly agreed to the following:
  - Hudson would be a Custody Assistant for a time so LACERA could reexamine her medical eligibility
  - If LACERA stated Hudson was still disabled, she would remain a Custody Assistant
  - If LACERA determined she was no longer disabled, Hudson would be returned to the position of deputy

Facts: Background (cont’d)

- October 8, 2008: Hudson’s physician released her to work as a deputy sheriff
- November 2008, AME [worker’s compensation doctor] released Hudson as a deputy sheriff

Facts: The Written Agreement

December 22, 2008, the County and Hudson entered into a written agreement, which memorialized the "oral" agreement. The agreement specified:

- Hudson would be a Custody Assistant for 120-days
- Hudson would be medically reevaluated by LACERA
- Hudson would be restored as a deputy sheriff if cleared by LACERA
- If LACERA did not clear Hudson, she would be made a permanent Custody Assistant

Facts: LACERA Refuses to “Play Ball”

- However…because Hudson withdrew her retirement contributions in December 2006, LACERA determined that her membership had ended and it refused to reevaluate her disability status
- In June 2009 the Department and LACERA allegedly orally “agreed” to accept Hudson based upon her physician’s statement (this is contested by the Department)
- Ultimately, the Department refused to reinstate without a determination by LACERA, given the prior decision that she was disabled
- LACERA refused to make any official findings due to the fact that Hudson withdrew her contributions and thus was no longer a member

Hudson's Superior Court Lawsuit

- Hudson filed suit against the County and LACERA – his claims are convoluted, but he is apparently claiming the following:
  - The County was obligated to reinstate Hudson as a deputy sheriff under the contract(s)
  - The County should be compelled to reinstate Hudson per the Commission's order of February 2008 requiring reinstatement following her for-cause discharge
  - LACERA failed to inform Hudson of the consequences of her withdrawal of retirement contributions
  - LACERA be required to accept Hudson's repayment of retirement contributions

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The Superior Court dismissed Hudson's lawsuit, but . . .

Court of Appeal: REVERSED (sort of)

- The Court of Appeal ruled, among other things:
  - The settlement agreement might (or might not) supersede the Commission's order requiring Hudson to return to work…
  - The disability retirement ordered by LACERA might (or might not) have deprived the Commission of jurisdiction over Hudson's prior discharge
  - The jurisdiction of the Commission is not based upon a severance of the employment relationship, but the manifested intent of the employee
  - Likewise, the Court of Appeal distinguished the prior cases of Zuniga and Latham which adopted a "bright line" rule of Commission jurisdiction
  - The matter goes back to the trial court for determination on these issues

Sometimes Courts Just Get it Wrong. Period.

- The Court created a great deal of uncertainty on several fronts
  - Does LACERA have the final word on whether an employee is disabled, or not?
  - How can the County "comply" with a Commission order and return an employee to work if in the interim LACERA awards the employee a disability retirement?
- The Court then published the case, creating uncertainty for the County as well as the Courts
- By doing so, the Court virtually guarantees more litigation

What Was Once Clear is No Longer: Ambiguities Created by the Hudson Decision

- The Commission's Jurisdiction: Is this still a bright line, or simply a matter of an employee's expressed intent?
- LACERA's Disability Determination: Does LACERA have the last word on whether an employee is physically capable of working, or not?
- The County's Quandary: If LACERA no longer has the last word regarding whether an employee is disabled for disability retirement purposes, who does?

A “bright line” Rule No More: Key Quote from Hudson

“Under these circumstances Hudson’s disability retirement cannot be deemed to have established her intention to forever sever her employment status with the Department (the ground on which the broad rule stated in the Zuniga and Latham, supra, decisions rest) to forfeit her pending Civil Service Commission appeal.”

Hudson v. County of Los Angeles, 232 Cal.App.4th 392, 413 (2014).

But, a New Glimmer of Hope…

In the even more recent case Monsivaiz v. Los Angeles County Civil Service Commission, 236 Cal.App.4th 236 (2015), the court affirmed the bright line jurisdictional rules of Zuniga and Latham, and did not follow Hudson.

The Court called the facts in the Hudson case "unique" and "somewhat tortured."

What can we learn from Hudson

- 1. The Court of Appeal does not always get it right
- 2. If the Commission makes an order that is not workable, a Department must timely challenge in the Superior Court or be possibly be saddled with all of the consequences of that decision, whether it is logical, legal or not.