S204221

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARATRANSIT, INC.

Plaintiff and Respondent,

vs.

UNEMPLOYMENT INSURANCE APPEALS BOARD

Defendant;

CRAIG H. MEDEIROS,

Real Party in Interest and Appellant.

After a Decision of the Court of Appeal,
Third Appellate District Court Case No. C063863

Appeal from a Judgment of the Superior Court of the
State of California, County of Sacramento
Honorable Timothy M. Frawley, Judge
Case No. 34-2009-80000249

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

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Attachments:

TABLE OF AUTHORITIES

Page No.

Federal Cases

State Cases

Precedent Decisions of the California
Unemployment Insurance Appeals Board

California Regulations and Statutes

Miscellaneous

INTRODUCTION

In recognition of the public and private harms of unemployment, the Legislature enacted the Unemployment Insurance Code to confer benefits upon Californians who are temporarily out of work through no fault of their own. A worker discharged for misconduct connected with his most recent work is at fault for the purposes of the Unemployment Insurance Code, and thus ineligible for unemployment insurance benefits.

The present matter arose from Appellant's refusal to sign a disciplinary memorandum necessitated by his conduct. Appellant, a former employee of a non-profit corporation that serves the elderly and disabled, was accused of sexually harassing one of his employer's customers in 2008. This was not the first time Appellant faced such an accusation. Upon investigation, the employer determined that the complained of sexual harassment had occurred, and presented Appellant with a disciplinary memorandum temporarily suspending his employment. This was not the first time Appellant was presented with such a disciplinary memorandum. Appellant was instructed to sign the disciplinary memorandum, and refused, which resulted in his discharge. Since then, an Administrative Law Judge, the Superior Court for the County of Sacramento and the Court of Appeal all reached the same conclusion: Appellant committed misconduct within the meaning of the Unemployment Insurance Code by refusing to sign the disciplinary memorandum. As demonstrated hereinbelow, the Court of Appeal considered all of the relevant evidence, applied the appropriate legal standards and reached the proper conclusion that Appellant is ineligible for unemployment insurance benefits due to his misconduct.

STATEMENT OF ISSUES

1. Whether an employee's refusal to comply with an employer's lawful and reasonable order that he sign a disciplinary memorandum "as to receipt" constitutes misconduct within the meaning of the California Unemployment Insurance Code.

2. Whether, for the purposes of establishing misconduct within the meaning of the California Unemployment Insurance Code, there must be a finding of injury to an employer's interest, or a tendency for such injury, and if so, whether that finding be implied.

3. Whether the evidentiary record supports the Court of Appeal's finding that Appellant did not make a good faith error in judgment when he refused to comply with an employer's lawful and reasonable order that he sign a disciplinary memorandum "as to receipt."

STATEMENT OF FACTS

Respondent Paratransit, Inc. ("Respondent"), a private, nonprofit corporation, provides transportation services for the elderly and disabled. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2012) 206 Cal.App.4th 1319, 1322, review granted Sept. 26, 2012 S204221 ["*Paratransit*"].) Respondent employed Appellant as a vehicle operator beginning in 2002. (*Ibid.*) On his application for employment, Appellant affirmed that he had not been convicted of any criminal offenses; however a fingerprint search with the Department of Justice later revealed a prior conviction. (*Ibid.*) Appellant was terminated due to this misrepresentation, but subsequently reinstated as a vehicle operator based on his statement that the conviction arose from a domestic dispute. (*Ibid.*)

As a condition of his employment, Appellant joined a designated union and was required to abide by the terms of the collective bargaining agreement ("CBA") between Respondent and said union. (*Paratransit, supra,* 206 Cal.App.4th at p. 1322.) At all times relevant, the CBA provided that "*disciplinary notices must be signed by a Vehicle Operator when presented to him or her provided that the notice states that by signing, the Vehicle Operator is only acknowledging receipt of said notice and is not admitting to any fault or to the truth of any statement in the notice.*" (*Ibid*, italics in original.) At some point prior to 2008, the president of the designated union allegedly provided Appellant a card which Appellant characterized as advising him not to sign *anything* outside the presence of a union representative. (*Id.* at 1323; Clerk's Transcript On Appeal, Appeal From the Judgment Of The Superior Court of California, County of Sacramento, Hon. Timothy Frawley ["CT"] 53-54, 56-57.) The card in question read: "STATING YOUR WEINGARTEN RIGHTS TO THE EMPLOYER: 'If this discussion could in any way lead to my being disciplined or terminated or have any effect on my personal working

conditions, I respectfully request that my union representative, officer, or steward be present at this meeting. Without union representation, I choose not to participate in the discussion.'"[1] (CT 75.) Appellant further alleged that the union president advised him that once a document is signed, Respondent could use that document as an admission of fault, and that the union could not afterwards help defend him. (CT 21, 53.) As the Court of Appeal noted, "The trial court made a credibility determination that the union president did not in fact say what [Appellant] testified he said." (*Paratransit, supra*, 206 Cal.App.4th at p. 1331.)

On September 17, 2004, Respondent issued Appellant a written disciplinary warning for "inappropriate language and behavior" toward management. (CT 78.) The 2004 disciplinary memorandum read under the signature line, "Employee Signature (as to receipt only)." (*Paratransit, supra,* 206 Cal.App.4th at p. 1323; CT 78.) When Appellant received the 2004 disciplinary memorandum, he was instructed to sign it, and informed that refusal to sign would result in his termination. (*Paratransit, supra* 206 Cal.App.4th at p. 1323.) Appellant understood that Respondent would in fact terminate him for failure to sign the 2004 disciplinary memorandum, and signed the memorandum "so I wouldn't get fired." (*Ibid*; CT 67-68, 78.) Appellant was not discharged after signing the 2004 disciplinary memorandum, and received no further discipline regarding the matter. (CT 67-68.)

In or around 2006, a passenger lodged a complaint of unlawful harassment against Appellant. (CT 34.) After finding the complaint lacked credibility, Respondent resolved the matter by reminding Appellant to remain professional in the performance of his duties. (CT 34.) Then, in February, 2008, yet another passenger lodged a sexual harassment

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[1] The card articulates the rights established in *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251 ("*Weingarten*").

complaint against Appellant. (*Paratransit, supra*, 206 Cal.App.4th at p. 1322.) Respondent's Human Resources Manager investigated the complaint, including interviewing the complainant and Appellant and reviewing Appellant's personnel file. (CT 31.) At no time during the investigation of the 2008 sexual harassment complaint did Appellant request union representation, as he could have under *Weingarten*. (*Paratransit, supra*, 206 Cal.App.4th at p. 1330; see *Weingarten*, *supra,* 420 U.S. at p. 251.) As a result of the investigation, Respondent concluded that the alleged sexual harassment had in fact occurred. (*Ibid.*) Respondent's representatives prepared a disciplinary memorandum stating that Appellant was being disciplined for the February 2008 sexual harassment complaint. (*Id.* at p. 1322.) Below the signature line, the 2008 disciplinary memorandum stated: "Employee Signature as to Receipt." (*Id.* at p. 1323; CT 73.)

On May 2, 2008, Respondent called Appellant into a meeting to inform him that a decision had been made to discipline him in connection with the 2008 sexual harassment complaint. (CT 16, 25-26.) At this meeting, Appellant was presented with the 2008 disciplinary memorandum. (CT 16, 26, 73.) Upon receipt of said memorandum, Appellant demanded union representation. (CT 16, 30, 53.) In response to his request, Appellant was told that because the meeting was to inform him of discipline that had already been determined, he was not entitled to union representation. (CT 16, 35; see *Weingarten*, *supra,* 420 U.S. 251.)

Consistent with its handling of the 2004 disciplinary memorandum, Respondent advised Appellant that signing the 2008 disciplinary memorandum was merely an acknowledgment of receipt and not an admission of the truth of any statement contained therein. (*Paratransit*, *supra*, 206 Cal.App.4th at p. 1324.) Furthermore, Respondent informed the Appellant that the applicable CBA required him to sign the 2008

disciplinary memorandum. (CT 16-17, 37, 46.) Appellant refused to sign the 2008 disciplinary memorandum. (CT 17, 26, 73.) The only reason Appellant voiced for his refusal to sign was that his union president allegedly had advised him not to sign any documents outside the presence of a union representative. (CT 52-72.) At no point during the meeting did Appellant voice any concerns that the 2008 disciplinary memorandum did not include language allegedly required by the applicable CBA; nor did Appellant ask Paratransit to change the language of the 2008 disciplinary memorandum to conform to the CBA. (CT 52-72 [Claimant failing to mention any protest based upon language required by the collective bargaining agreement upon the disciplinary memorandum when testifying as to events of the May 2, 2008 meeting]; see also *Paratransit, supra*, 206 Cal.App.4th at p. 1327 ["At no time during the May 2 meeting did [Appellant] assert he would not sign the document because it failed to comply with the CBA. There is no indication he was even aware of the terms of the CBA."].)

Also consistent with its handling of the 2004 sexual harassment incident and resulting disciplinary memorandum, Respondent then advised Appellant that if he did not sign the 2008 disciplinary memorandum his employment would be terminated. (CT 16, 37.) Despite admitting that he had previously signed the 2004 disciplinary memorandum "so I wouldn't get fired," Appellant did not believe that a failure to sign the 2008 memorandum would result in his termination. (*Paratransit, supra*, 206 Cal.App.4th at p 1323.) Rather, Appellant believed that by refusing to sign the 2008 disciplinary memorandum, he would force Respondent to reschedule the meeting in the presence of a union representative, despite not having requested union representation at any time during the investigation that led to the 2008 disciplinary memorandum. (*Ibid.*) Appellant also believed that Respondent's verbal advisement that a

signature was not an admission of fault and the similar written advisement within the signature block, were lies. (*Ibid.*) The meeting ended with Appellant's refusal to sign the disputed disciplinary memorandum. (CT 56.)

Following the May 2, 2008 meeting, Respondent terminated Appellant's employment for insubordination. (CT 17, 30-31.)

PROCEDURAL HISTORY

Upon his termination, Appellant filed for unemployment benefits with the Employment Development Department ("EDD") on or about May 9, 2008. (CT 16, 25.) The EDD denied Appellant's application pursuant to Unemployment Insurance Code section 1256 ("section 1256"), finding that Appellant had been discharged for misconduct. (CT 16.) Appellant appealed the EDD decision. (CT 16.) Following a hearing on the matter before Administrative Law Judge Jeevan S. Ahuja ("ALJ"), the ALJ affirmed the decision, finding Appellant had engaged in misconduct by deliberately disobeying a reasonable order. (CT 16-18.)

Appellant appealed the ALJ's decision to the California Unemployment Insurance Appeals Board ("CUIAB"). (CT 21.) After reviewing the record, the CUIAB reversed the ALJ decision, 2-1, and awarded Appellant unemployment benefits. (CT 20-22.) The CUIAB found that Appellant had not engaged in misconduct because: 1) Respondent had failed to allow union representation during the disciplinary meeting; 2) the 2008 disciplinary memorandum did not technically comply with the applicable CBA; and 3) Appellant was tired and confused at the time of the meeting. (CT 20-22.)

Respondent then filed a petition for writ of administrative mandamus with the Superior Court below in response to the CUIAB decision. (CT 1-12.) Consistent with the previous decisions of the EDD and ALJ, the Superior Court, Honorable Timothy H. Frawley, held that Appellant was

disqualified from unemployment benefits pursuant to section 1256. (CT 478-488.) The Superior Court found that Appellant had engaged in misconduct by deliberately refusing to sign the 2008 disciplinary memorandum, and that his refusal to sign the memorandum was not a "good faith" mistake. (CT 478-488.)

Appellant appealed the Superior Court decision to the Third Appellate District. On May 31, 2013, the Third Appellate District affirmed the Superior Court's ruling that Appellant was disqualified from unemployment benefits pursuant to section 1256. (*Paratransit, supra*, 206 Cal.App.4th at p. 1321.) On or about June 14, 2012, the Third Appellate District ordered its decision be published. Appellant filed a Petition for rehearing, which was denied on July 3, 2012. Appellant then petitioned this Court for review on July 23, 2012, which this Court granted on September 26, 2012.

STANDARD OF REVIEW

This action arises from a trial court's ruling on a writ of mandate; accordingly the proper standard of review is whether the finding and judgment of the lower court is supported by "substantial, credible and competent evidence." (*Lozano v. Unemployment Ins. Appeals Bd.* (1982) 130 Cal.App.3d 749, 754 ["*Lozano*"]) Thus, "all conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences made to uphold the superior court's findings; moreover, when two or more inferences can be reasonably deduced from the facts, the appellate court may not substitute its deductions for those of the superior court." (*Lacy v. California Unemployment Ins. Appeals Bd.* (1971) 17 Cal.App.3d 1128, 1134 ["*Lacy*"], citing *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 72.) While independent review is the appropriate standard for pure questions of law, a pure question of law arises only in the absence of disputed facts. (*Lacy, supra*, 17 Cal.App.3d 1128, 1134.) Where decisive facts are disputed, the "substantial evidence standard" applies. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 798.) Likewise, where interpretation of a writing turns upon extrinsic evidence such is not a question of law appropriate for independent review. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 ["*Parsons*"].)

Here, contrary to Appellant's assertions, the "writings" before this Court do not implicate independent review. In the words of the Third Appellate District court, the CBA is a "red herring." (*Paratransit, supra*, 206 Cal.App.4th at p. 1327.) There is no evidence that Appellant was even aware of the terms of the CBA, or that he refused to sign the 2008 disciplinary memorandum due to its terms. (*Ibid.*) To the extent that resolution of the issues before this Court requires interpretation of a "writing," it is not the CBA, but rather the 2008 disciplinary memorandum. Appellant cannot challenge the language of the signature block yet contend

that it evinces no ambiguity, nor contend that no extrinsic evidence related to the same was presented below. (See *Id.* at p. 1324 [trial court acknowledging discrepancies in language between CBA and signature block, but finding it nonetheless "sufficiently clear"; see also CT 50, 58 [extrinsic evidence introduced that Respondent advised Appellant that the language of the signature block was as to receipt only, and not an admission of wrong doing].) Moreover, as set forth below in POINT I.a., *infra*, this Court may not interpret the terms of the CBA under any standard.

POINT I

THE COURT OF APPEAL PROPERLY FOUND THAT APPELLANT VIOLATED HIS DUTY TO COMPLY WITH HIS EMPLOYER'S LAWFUL AND REASONABLE ORDER

a. An employee has a duty to obey an employer's lawful and reasonable order concerning his or her employment, regardless of the terms of a collective bargaining agreement.

California Labor Code section 2856 provides that, "An employee shall substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee." The California Code of Regulations section 1256-36, subdivision (b) states: "Implicit in the agreement of hire is the concept that an employee is subject to some degree of authority exercised by the employer or the employer's representative. An employee is insubordinate if he or she intentionally disregards the employer's interest and willfully violates the standard of behavior which the employer may rightfully expect of employees in any of the following ways: [¶] (1) Refuses, without justification, to comply with the lawful and reasonable orders of the employer or the employer's representative." Thus, the threshold inquiry in determining whether an employee has committed

misconduct for the purposes of unemployment insurance benefits is whether the employee owed a duty to the employer. Here, the Court of Appeal found that pursuant to Labor Code section 2856, the Appellant had a duty to sign the 2008 disciplinary memorandum and that his failure to do so constituted misconduct for the purposes of receiving unemployment insurance benefits. (*Paratransit, supra*, 206 Cal.App.4th at p. 1327.)

Appellant attempts to excuse himself from the duty to comply with his employer's reasonable order to sign the 2008 disciplinary memorandum by arguing that such was unreasonable per se due to an alleged technical violation of the CBA. In other words, Appellant contends that if this Court finds the language in the 2008 disciplinary memorandum violated the applicable CBA to any degree, the reasonableness of the employer's order to sign the document is irrelevant. For the reasons set forth herein below, the reasonableness of an employer's order is not dependent the terms of a CBA, but rather the nature of the order itself.

In its precedent decisions evaluating employee misconduct, the California Unemployment Insurance Appeals Board ("CUIAB") has consistently found that the reasonableness of an employer's order is determined by examining the nature of the order itself. For example, in *Ludlow v. North American Aviation, Inc.* (1960) P-B-190, the CUIAB found that an employee committed misconduct without evaluating whether the order was "consistent" with an applicable contract. The employee in *Ludlow* refused to obey his employer's order to dust off fire extinguishers based upon his union representative's advice that such work was outside of his work classification as presumably set forth in a CBA. (CT 120-121 [*Ludlow, supra,* P-B-190 at pp. 1-2].)

In reviewing the matter, the CUIAB did not consider whether or not the employer's direction violated the applicable employment agreement or was strictly consistent with its terms. (CT 122-123 [*Ludlow, supra*, P-B-

190 at pp. 3-4.) Rather, the CUIAB determined that the proper analytical framework to evaluate the employee's refusal to obey the direction was to examine whether the order itself was lawful and reasonable. (*Ibid.*) The employee's refusal to follow the direction was misconduct because the instruction to dust off the fire extinguishers was not itself unreasonable or unlawful. (*Ibid.*) The CUIAB also identified an alternative to noncompliance with the order: if the employee believed that the direction to dust off the fire extinguishers amounted to a breach of the CBA, the proper course of action for the employee was to follow the reasonable order and then file a grievance. (*Ibid.*) Following *Ludlow*, whether an employer's order is contrary to the requirements of an employment agreement is not per se determinative of whether the order itself is lawful and reasonable. (CT 120-123 [*Ludlow, supra,* P-B-190.]) Thus, the inquiry to determine whether the employee owes a duty of compliance under Labor Code section 2856 must focus on the nature of the employer's order.[2]

The CUIAB reached a similar conclusion in *Gant v. General Motors* (1978) P-B-400 ("*Gant*"). There, the employer was bound by a six-step progressive disciplinary procedure for terminating employees. (CT 137-140 [*Gant*, *supra*, P-B-400 at p. 2].) The employee in question was terminated after disobeying an order from his employer. (CT 140 [*Gant*, *supra*, P-B-400 at p. 4].) The employer admittedly failed to follow its six-

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[2] Appellant fails to distinguish *Ludlow* from the present matter. (Appellant's Opening Brief, hereinafter "AOB" at p. 14, n. 2.) While *Ludlow* does not explicitly reference a CBA, it addresses work classifications governed by an agreement between an employer and union, and an order that was not explicitly consistent with said work classifications. (CT 122-13 [*Ludlow*, *supra*, P-B-190 at pp. 3-4].) The agreement at issue in *Ludlow* did not provide that the employee was responsible for the task of dusting fire extinguishers, and thus, by its terms, the order to do so may have violated the employment agreement. (*Ibid.*) The CUIAB nonetheless found the order itself reasonable. (*Ibid.*)

step progressive disciplinary procedure in terminating the employee. (CT 140 [*Gant*, *supra*, P-B-400 at p. 2].) The CUAIB found that the issue of whether the employee had violated a duty and committed misconduct was not dependent upon the adherence to a progressive discipline procedure, because the claimant's actions "constituted misconduct *without* regard to private rule or standards." (CT 140 [*Gant*, *supra*, P-B-400 at p. 4, emphasis added].) Following *Gant*, a claimant's entitlement to unemployment benefits "is not a matter subject to private agreement between parties or a set of progressive disciplinary rules or procedures established by an employer." (CT 140 [*Gant*, *supra*, P-B-400. at p. 4].) Said "private agreement" between parties is analogous to the CBA provision at issue in the present matter. *Gant* also repeated *Ludlow*'s conclusion that "if employees doubt the reasonableness or legality of supervisors' instructions, they should seek redress through other avenues than disobedience." (CT 139 [*Gant*, *supra*, P-B-400 at p. 3].) Thus, CUIAB precedent establishes that an order may be reasonable in and of itself so as to trigger an employee's duty of compliance under Labor Code section 2856.

Appellant argues against precedent that the reasonableness of an employer's order depends upon strict consistency with an employment contract or CBA. (Appellant's Opening Brief ["AOB"] at p. 12.) Appellant relies on a 93-year-old wrongful discharge case for the proposition that an express employment contract limits an employee's duty to obey the reasonable orders of their employer. (*May v. New York Motion Picture Corp.* (1920) 45 Cal.App. 396, 402-403 ["*May*"].) At issue in *May* was an employee's discharge for failure to obey the employer's order, and the employee's subsequent suit for wrongful termination. (*Ibid.*) *May* did not concern a claim for unemployment insurance benefits. The plaintiff in *May* was terminated because she failed to obey her employer's order that she report for work at a specified time. (*Ibid.*) The *May* court employed a

two step-analysis to address the plaintiff's claim for wrongful termination. (*Id.* at pp. 398-401.) First, the court determined that the order to timely appear at work was consistent with the terms of the written employment contract, and then it reached the question of whether the order was reasonable.[3] (*Id.* at p. 401.) *May* is inapposite because the duties the plaintiff in *May* owed to her employer were entirely embodied in the written employment contract. Appellant's employment was not governed entirely by an employment contract, but rather was subject to various rules and regulations concerning his employment, one source of which was the applicable CBA. Labor law requires that a CBA specify the terms and conditions of employment, but there are many other rules and regulations that govern the employer-employee relationship, such as those articulated in employee handbooks and the Labor Code. Accordingly, it would be error to follow *May* and focus strictly on whether the disputed order was consistent with the terms of the CBA.

Moreover, Appellant invests *May* with an unwarranted importance in unemployment benefits decisions which, as set forth herein above, have consistently avoided application of *May*'s analytical framework. Appellant offers *Matter of Anderson* (1968) P-B-3 as an example of *May* being applied to the analysis of misconduct for the purposes unemployment insurance benefits. (AOB at p. 12.) At issue in *Matter of Anderson* was an employer's rule that employees remain unmarried, which was found to be illegal and void on its face. (CT 285-296 [*Matter of Anderson*, *supra*, P-B-3

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[3] In evaluating the reasonableness of the employers' order, the *May* court noted that it was the employee's conduct that necessitated the order. (*May*, *supra*, 45 Cal.App. at pp. 401, 407.) May was an actress employed by a studio to act in a film. Here, the same concept could apply where Appellant's repeated acts of sexual harassment toward clients led to the issuance of the 2008 disciplinary memorandum and need for signed acknowledgment of such. (CT 73; *Paratransit*, *supra*, 206 Cal.App.4th at p. 1330.)

at p. 9].) *Matter of Anderson* did not, however, apply *May*'s analytical framework. Rather, it merely cited *May* for the rule that:

> The duty of an employee is to obey the employer's lawful and reasonable orders within the scope of the contract of employment, but not to 'obey further...than is consistent with law.' (Labor Code section 2856; *May v. New York Motion Picture Corporation* (1920) 45 Cal.App. 269.

(CT 290 [*Matter of Anderson*, supra, P-B-3 at p. 6, emphasis in original).]

Accordingly, *Matter of Anderson* referenced *May* as support for the principle that an employee has a duty to comply with an employer's reasonable orders as codified by Labor Code Section 2856—in other words, to "substantially comply with all directions of his employer concerning the service on which he is engaged." (Labor Code, § 2856; *Matter of Anderson*, *supra*, P-B-3 at p. 6.) In *Matter of Anderson*, the order at issue forbidding marriage could not be said to be "lawful" and "concerning the services" on which the employee was engaged. *Matter of Anderson* is no more instructive than *May*.

Appellant attempts to bring his case within the scope of *Moosa v. State Personnel Bd.* (2002) 102 Cal.App.4th 1379, 1386 ("*Moosa*"), which held that *public employees* may refuse to obey an order of their superiors if they have a "legitimate reason" or "valid excuse" for their refusal. *Moosa* is not instructive here. In *Moosa*, a public employee professor was demoted pursuant to Education Code section 89535, which in pertinent part provides for such a demotion in the event of "unprofessional conduct" and/or "failure or refusal to perform the normal and reasonable duties of the position." (*Moosa*, *supra*, 102 Cal.App.4th at pp. 1383-1385; Education Code, § 89535, subds. (b), (f).) Pursuant to its interpretation of the terms "unprofessional conduct" and "normal and reasonable duties of the position" as used within Education Code section 89535, the *Moosa* court determined that the statute did not authorize the demotion of a *public*

employee professor who fails to follow an order not authorized by the applicable CBA. (*Moosa*, *supra*, 102 Cal.App.4th at pp. 1385-1387, emphasis added.)

The matter before this Court does not implicate Education Code section 89535. Nor are the terms "unprofessional conduct" and "normal and reasonable duties of the position" at issue. Indeed, in *Ludlow*, the CUIAB specifically found that "misconduct" under Unemployment Insurance Code section 1256 encompasses more than simply the normal duties of an employment position, but also includes any direction that might extend beyond the scope of the position, so long as the order is not unlawful or unreasonable. (CT 122-123 [*Ludlow, supra,* P-B-190 at pp. 3-4].)

In sum, following *Moosa* a "public employee may refuse to follow an order of his or her superiors if he or she has a legitimate reason or a valid excuse for the refusal." (*Moosa*, *supra*, 102 Cal.App.4th 1379, pp. 1386-1387.) *Moosa* concerned a challenge to a demotion before the State Personnel Board; it did not concern an unemployment insurance benefits determination before the CUIAB. A private employee, such as Appellant, is subject to Labor Code section 2856 which explicitly provides "[a]n employee shall substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new *and* unreasonable burdens upon the employee." (Lab. Code, § 2856 [emphasis added].) Whereas the instant matter concerns the interpretation of the term "misconduct" under Unemployment Insurance Code section 1256 for private employees, not "unprofessional conduct" or "normal and reasonable duties of the position" for public employee professors under Education Code section 89535, *Moosa* is inapplicable to the resolution of the instant

matter. Rather, Labor Code section 2856, *Ludlow,* and *Gant,* control the analysis.

Appellant argues that failing to extend the holding of *Moosa* beyond public employees and the Education Code to private employees would put unemployment insurance law out of step with long standing employment and labor law principles, thereby harming workers by forcing them to either follow orders that breach CBAs or face unemployment without benefits. (AOB at p. 15.) Appellant misunderstands the role CBAs play in labor law, and the protections employees are afforded by grievance procedures. Providing remedies for breaches of a CBA is the precise purpose for including grievance procedures in a CBA. (See generally *Hughes Tool Co. v. NLRB* (5th Cir. 1945) 147 F.2d 69, 73 [collective bargaining agreements include grievance procedures as an orderly and just method for redressing work place conditions].)

Relying on *Rabago v. Unemployment Ins. Appeals Bd.* (1978) 84 Cal.App.3d 200, 214 ("*Rabago*"), Appellant downplays the significance of grievance procedures, and argues that the mere existence of such a procedure does not require an employee to comply with an employer's order as a condition for unemployment insurance benefit eligibility. The grievance procedure in *Rabago* is not instructive here. There, the court found that the "skimpy record in this case was wholly inadequate" to support a conclusion that the grievance procedure "was an appropriate or feasible alternative for [the employee] in the circumstances of his complaints and nature of his employment." (*Rabago*, supra, 84 Cal.App.3d at p. 214.) The court further noted that the record contained the "barest references" to the existence of a grievance procedure, and did not indicate whether appellant was even familiar with said procedure. (*Ibid.*) After being terminated in 2002 due misrepresenting his criminal record on his application for employment, Appellant filed a grievance regarding his

termination. (*Paratransit*, *supra*, 206 Cal.App.4th at p. 1322; CT 45) Appellant was subsequently reinstated after informing Respondent's executive director that his misstatement of his criminal record arose from a domestic dispute, and the grievance was withdrawn. (CT 45.) Compliance with a grievance procedure is not required for unemployment insurance eligibility, but it is an appropriate alternative to refusing to obey a reasonable order.

Parties to a CBA negotiate a grievance procedure to provide the appropriate means for determining whether the agreed upon CBA terms have been violated. Due to the protections afforded by grievance procedures, an employee who believes an employer order violates the terms of the CBA can seek full recourse for the violation through the grievance procedure. (See CT 122-123; *Ludlow*, *supra*, P-B-190 at pp. 3-4 [CUIAB "has consistently adhered to the view that deliberate disobedience of lawful and reasonable instructions is misconduct and that if employees doubt the reasonableness or legality of supervisors' instructions, they should seek grievance elsewhere. [Citations.]".) Even in the event that an employee is terminated, he could still pursue the grievance and arbitration procedure and be reinstated to his job if his contentions were correct and the CBA was in fact violated. Here, Appellant invoked the grievance procedure under the CBA to be reinstated in connection with a previous matter (CT 45, 122-123), and could have done the same in 2008.

Finally, Appellant's proposition would set a harmful precedent because an employee would be excused from following any order that he believes violated the CBA, however technical the violation, without utilizing the grievance procedure. This would eliminate the agreed upon and bargained for grievance and arbitration provisions in the CBA. If every direction from an employer could be challenged in this manner, it would grind business to a halt. The policy behind labor agreements is to work

now, grieve later. (See Elkouri & Elkouri, How Arbitration Works (7th ed. 2012) §5A, p. 16-31 ["It is a well-established principle that employees (1) must obey management's orders and carry out their job assignments, even if such assignment are believed to violate the agreement; and (2) then turn to the grievance procedure for relief"]; *Krist Oil Co.* (1999) 328 NLRB 108, at p. *6 ["[T]he principle of 'work now, grieve later'...is the accepted industrial norm...that if an employee is working, and there is a claim of employer misconduct directed at her, the employee should continue to work, make the claim, and subsequently receive a remedy for any proven misconduct."].)

b. The Court of Appeal implicitly found that Appellant had a duty to comply with the order to sign the 2008 disciplinary memorandum.

Appellant contends that the Appellate Court "improperly evaded" the issue of whether he had a duty to comply with the order to sign the 2008 disciplinary memorandum. (AOB at p. 16.) That Appellant disagrees with the decision of the Court of Appeal does not mean that the Appellate Court failed in its inquiry. Appellant's contention is unavailing for the following reasons.

First, contrary to Appellant's assertions, the Court of Appeal did not ignore the question of whether Appellant had a duty to sign the 2008 disciplinary memorandum. (See *Paratransit*, *supra*, 206 Cal.App.4th at pp. 1327-1328.) To the extent that Appellant contends that the Court of Appeal was required to make an express finding as to whether order to sign the 2008 disciplinary memorandum was reasonable, Appellant is mistaken because such a finding is implicit in the *Paratransit* decision. (*Richter v. Walker* (1951) 36 Cal.2d 634, 640; *Thornton v. Dept. of Human Resources Development* (1973) 32 Cal.App.3d 180, 186 ["*Thornton*"] [implicit finding of that an order was reasonable may be permissible].) When Court of

Appeal found that the order to sign the 2008 disciplinary memorandum not "new and unreasonable," it implicitly found the order to be reasonable. (*Paratransit*, *supra*, 206 Cal.App.4th at p. 1327.) Second, as set forth herein above in POINT I.a., *supra*, the threshold issue of whether Appellant had a duty to sign the disciplinary memorandum is not controlled by the CBA, but by the nature of the order itself, which Appellant did not argue would impose a new or unreasonable burden beyond failing to track the exact language of the CBA. (*Id.* at p. 1327.)

Third, contrary to Appellant's assertions, the Court of Appeal did not speculate as to what would happen if the Appellant had been presented with a disciplinary memorandum that he could not later contend technically violated the CBA. (See AOB at p. 17.) Rather, the Court of Appeal evaluated the factual record. Appellant refused to sign the 2008 disciplinary memorandum because he claimed his union president advised him not to sign any documents outside the presence of a union representative. (CT 52-72; *Paratransit*, *supra*, 206 Cal.App.4th at p. 1327.) Appellant did not voice concerns that the 2008 disciplinary memorandum did not comply with the CBA, nor ask that the language of the 2008 disciplinary memorandum be changed. (CT 52-72; *Paratransit*, *supra*, 206 Cal.App.4th at p. 1327 ["There is no indication he was even aware of the terms of the CBA."].) Rather than asking if Appellant would have complied with the order to sign the 2008 disciplinary memo if the language contained therein was different, the Court of Appeals properly focused on Appellant's unequivocal reason given for refusing to obey the order. Such is not speculation or conjecture, but rather relevant to Appellant's subjective belief, as set forth herein below in POINT III, *infra*. To the extent that the facts underlying Appellant's refusal to sign the 2008 disciplinary memorandum are disputed, the Court of Appeal's credibility

determination and decision is entitled to deference. (*Ghirardo v. Antonioli*, *supra*, 8 Cal.4th at p. 798.)

Finally, contrary to the Appellant's arguments, the Court of Appeal did not hold that Appellant should have explicitly stated that the order to sign 2008 disciplinary memorandum violated a specific provision of the CBA. (AOB at p. 17.) For this argument, Appellant relies on *National Labor Relations Board v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 837 ["*City Disposal*"], which according to Appellant, holds that an employee is not expressly required to refer to a CBA in order to protect his rights under the CBA. *City Disposal* does not, however, support Appellant's position.

Under *City Disposal*, where an employee complains of a violation of a CBA, the complaint is reasonably clear to the person to whom it is communicated, and the complaint refers to a reasonably perceived violation of a CBA, the complaining employee is enforcing the CBA and need not explicitly refer to the CBA. (*City Disposal*, *supra*, 465 U.S. at p. 840.) *City Disposal* is inapposite for the following reasons. First, there is no indication that Appellant complained that the 2008 disciplinary memorandum violated the CBA. (CT 52-72.) Likewise, there is no indication that Appellant was even aware of the provision of the CBA he now claims to have been allegedly attempting to enforce. (*Paratransit*, *supra*, 206 Cal.App.4th at p. 1327.) Rather, to the extent that Appellant voiced a complaint regarding the order to sign the 2008 disciplinary memorandum, said complaint referred to a perceived violation of his *Weingarten* rights. Appellant requested a union representative and refused to sign anything without one. (CT 16, 30, 53, 52-72.) Appellant's refusal to sign anything without a union representative present was based on a card that specifically articulated his *Weingarten* rights. (*Paratransit*, *supra*, 206 Cal.App.4th at p. 1331.) *Weingarten* rights are a creation of case law, and

distinct from CBAs. (*Weingarten, supra*, 420 U.S. 251 at p. 254 [union employee has a right to have a union representative present during any discussion that could lead to discipline, termination, or an effect on working conditions].) Moreover, *Weingarten* rights were not implicated by the May 2, 2008 meeting during which Medeiros was presented with the 2008 disciplinary memorandum because the investigation had already concluded. (*Ibid*; *Paratransit, supra*, 206 Cal.4th at pp. 1322-1323.) Accordingly, Appellant's complaint that he would not sign anything without union representative present, and his retroactive attempt to invoke the protections of *Weingarten*, do not amount to a "reasonably perceived violation" of a CBA. (*City Disposal, supra*, 465 U.S. at p. 840.) Requesting union representation is not synonymous with complaining of a perceived violation of a CBA. Accordingly, *City Disposal* is not instructive in the present matter.

c. California contract law has no bearing on interpretation of the collective bargaining agreement, and the Labor Management Relations Act precludes this Court from interpreting the collective bargaining agreement.

Appellant argues he must be absolved of his misconduct because the 2008 disciplinary memorandum violates the language of the CBA. (AOB at p. 20.) Appellant's argument substantially depends upon interpretation of the terms of the CBA governing disciplinary notices. (*Ibid.*) Appellant scrutinizes the CBA through reference to California contract law, and in doing so ignores the well-established rules governing the interpretation and enforcement of CBAs. It is not the purview of a state court to determine whether the terms of a CBA were violated.

First, to the extent Appellant argues that the express terms of the CBA did not require him to sign the 2008 disciplinary memorandum, Appellant relies upon California Civil Code sections 1638, 1639 and 1644

and assorted case law. (AOB at p. 20.) This is not proper. Simply put, federal law preempts the use of state contract law in CBA interpretation and enforcement. (*Local 174, Teamsters of Am. v. Lucas Flour Co.* (1962) 369 U.S. 95, 103-104 ["*Local 174*"].)

Second, section 301 of the Labor Management Relations Act, codified at 29 U.S.C.S. §185, both preempts claims substantially dependent upon the terms of a collective bargaining agreement and precludes state courts from interpreting the provisions of a CBA. (*Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683, 689.) This Court accordingly lacks jurisdiction over interpretation of the CBA.[4] (See *Valles v. Hill* (9th Cir. Cal. 2005) 410 F.3d 1071, 1075 [section 301 preemption is jurisdictional, and extends to issues of law "substantially dependent" upon analysis of the terms of a collective bargaining agreement].) However, as demonstrated in POINT I.a., *supra*, interpretation of the CBA is not necessary to the resolution of the issues before this Court because the order to sign the 2008 disciplinary memorandum was itself lawful and reasonable and implicated Appellant's duty to comply.

Appellant's argument that he had no duty to obey the reasonable order of his employer based upon a technical violation of the CBA substantially depends upon interpretation of the terms of the CBA. Such an argument is not properly before this Court, and the state contract law cited to by Appellant has no bearing on the interpretation of the CBA. (AOB at p. 20; *Local 174, supra*, 369 U.S at pp. 103-104.) In sum, under the federal principles of labor law, CBA interpretation is for an arbitrator and not this Court. (See *Livadas v. Bradshaw* (1994) 512 U.S. 107, 121; *Lingle v. Norge Division, Magic Chef* (1988) 486 U.S. 399 [dispute

[4] To the extent that Respondent did not argue such below, it is incontestable that lack of jurisdiction may be raised at *any* stage of the proceedings. (*Barnick v. Longs Drug Stores* (1988) 203 Cal.App.3d 377, 379.)

involving a question of CBA interpretation must be resolved through arbitration, where an arbitration procedure is provided].) Appellant did not avail himself of the protections granted to him by arbitration or grievance procedures; instead, he refused a reasonable order of his employer and thereby committed misconduct for the purposes of the Unemployment Insurance code. (See CT 120-121[*Ludlow*, *supra*, P-B-190 at pp. 3-4].)

d. The lower courts interpreted the 2008 disciplinary memorandum, considered extrinsic evidence related to it, and properly found the 2008 disciplinary did not violate the CBA.

As demonstrated in POINT I.c., *supra,* interpretation of the CBA is a matter for an arbitrator, not this Court. Nonetheless, to the extent this Court engages in an interpretation of the language in the 2008 disciplinary memorandum for its CBA compliance, the Court of Appeal's finding that the 2008 disciplinary memorandum did not violate the CBA is entitled to the deference of the substantial evidence standard because said finding relied upon the consideration of disputed facts and extrinsic evidence. (See "STANDARD OF REVIEW," *supra; Lozano*, *supra*, 130 Cal.App.3d at p. 754; *Parsons*, *supra*, 62 Cal.2d at p. 865; *Lacy*, *supra*, 17 Cal.App.3d at p. 1134.)

As noted above, the signature block of the 2008 disciplinary memorandum read: "Employee signature as to Receipt." (*Paratransit*, *supra*, 206 Cal.App.4th at p. 1323.) The CBA provision at issue provides:

> *All disciplinary notices must be signed by a Vehicle Operator when presented to him or her provided that the notice states that by singing, the Vehicle Operator is only acknowledging receipt of said notice and is not admitting to any fault or to the truth of any statement in the notice.*

(*Id.* at p. 1322, emphasis in original.)

The CBA does not require any specific, quoted language to be included within a disciplinary notice. All the CBA requires is that the disciplinary memorandum set forth that the employee's signature will only be considered for the purpose of acknowledging receipt of the document, and that no allusion is made within the document that the signature will be considered an admission of fault. To this end, the signature block reading, "Employee Signature as to Receipt," with no other allusions within the signature block or the remainder of the document that the signature also signifies fault, satisfies this provision.

Rightfully, the Superior Court below reached the same conclusion that the 2008 disciplinary memorandum did not violate the applicable CBA. (CT 486-487.) As reasoned by the Superior Court, to state that a signature is to receipt, and to state that a signature is not an admission of fault, are "just two sides of the same coin." (CT 487.) Indeed, the language "Employee Signature as to Receipt" explicitly informed Appellant that his signature only acknowledges receipt of the notice and nothing else. The signature block did not state, "Employee Signature *Includes* as to Receipt," or the like. Rather, the statement "Employee Signature as to Receipt" can only be read that the single, exclusive purpose of the signature is to acknowledge receipt.

Appellant cannot challenge the language of the signature block on the 2008 disciplinary memorandum, yet contend it evinces no ambiguity to invoke some type of independent review standard. (See *Paratransit*, *supra*, 206 Cal.App.4th at p. 1324 [the signature block "sufficiently clear" despite discrepancy with CBA].) The courts below considered extrinsic evidence related to the signature block and the effect of signing, the employer's interpretation of the 2008 disciplinary memorandum, and verbal assurances that signature was not admission. (*Id.* At p. 1324; see also CT 50, 58.) Said evidence guided the interpretation of the 2008

disciplinary memorandum. Accordingly, the lower court's interpretation of the 2008 disciplinary memorandum is entitled to deference. (*Parsons*, *supra*, 62 Cal.App.2d at p. 865.) Following that interpretation, the 2008 disciplinary memorandum did not violate the express terms of the CBA, despite Appellant's assertions to the contrary. (*Paratransit*, *supra*, 206 Cal.App.4th at p. 1324.)

POINT II

CONTRARY TO APPELLANT'S ASSERTION, RESPONDENT DOES NOT HAVE A BURDEN TO PROVE INJURY TO ITS INTEREST AND, NEVERTHELESS, UNDER THE FACTS OF THIS CASE THE COURT OF APPEAL COULD PROPERLY INFER THAT APPELLANT'S INSUBORDINATE CONDUCT SUFFICIENTLY INJURED OR TENDED TO INJURE RESPONDENT'S INTERESTS

a. An employer does not have an independent burden to prove injury to its interests because the definition of misconduct includes conduct that is already regarded as being fundamentally adverse to an employer's interest.

In his Opening Brief, Appellant asserts that a finding of misconduct requires the employer to prove injury to its interest (AOB at pp. 26-27), relying heavily on *Maywood Glass Co. v. Stewart* (1959) 170 Cal.App.2d 719 ("*Maywood*") (AOB at p. 27.) Appellant's interpretation of *Maywood* is overbroad.

In *Maywood*, the court adopted a definition of misconduct from a Wisconsin Supreme Court opinion[5], which was subsequently adopted verbatim by this Court in *Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal.3d. 671 ("*Amador*"). In *Amador*, this Court defined "misconduct," within the meaning of the Unemployment Insurance Code, as being "limited to conduct evincing such willful or wanton disregard of an employer's interests **as is found in** deliberate violations or disregard of

[5] *Boynton Cab Co. v. Neubeck* (Wis. 1941) 237 Wis. 249 [296 N.W. 636].

standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." (*Id.* at 678; internal citations omitted; emphasis added.) Contrary to Appellant's assertion, in no way may this definition be read to place an affirmative burden of proof on the employer to prove "*damage*" to its interest. (See AOB at p. 27.)

The *Amador* definition expressly sets forth particular instances where conduct evinces such "willful or wanton disregard of an employer's interests" through inclusion of the phrase "as found in." The use of the phrase "as is found in" prefaces two illustrations, separated by use of the word "or," of the preceding concept, here, "conduct evincing willful or wanton disregard of an employer's interests." The court first articulates that such conduct "is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of his employee." The court continues, providing an alternative example for such conduct, "as is found in... carelessness or negligence of such a degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." Therefore, the very definition of misconduct necessarily includes that the employer has an interest, through the inherent nature of being an employer, in the employee not engaging in particular conduct.

Furthermore, Appellant's reliance on *Amador* for the proposition that, "conduct must be... harmful to the employer's interest... to constitute misconduct," (AOB at pp. 27-28) is misplaced because said proposition is nowhere to be found in the *Amador* opinion. To the extent Appellant

crafted the proposition from *Amador*'s definition of misconduct, it is erroneous for the aforementioned reasons.

Likewise, Appellant's reliance on *Perales v. Dept. of Human Resources Development* (1973) 32 Cal.App.3d 332 ("*Perales*") is also inapposite. Appellant cites to *Perales* for the proposition that "the employer has the burden to prove injury to its interests." (AOB at p. 27.) *Perales*, however, concerned the issue of whether an employee voluntarily quit his employment without good cause, not whether the employee committed misconduct. (*Perales*, *supra*, 32 Cal.App.3d at p. 336.) Consequently, harm to the employer's interest is not specifically discussed anywhere in *Perales*. The court merely held that Unemployment Insurance Code, section 1256 establishes a rebuttable presumption, rather than a conclusive one, that an employee was discharged for reasons other than misconduct and did not leave voluntarily without good cause, and further held that the employer must overcome the presumption by a preponderance of the evidence. (*Id.* at p. 340.) The *Perales* court accordingly did not address whether proof of injury to the employer's interest is an element of misconduct required to be independently proved by the employer.

In sum, contrary to Appellant's assertions, California law does not place an affirmative burden of proof on an employer to prove injury or "damage," as Appellant contends, to its interest.

b. Even if the court was required to make a finding of injury, or a tendency for injury, to the Respondent's interest, this Court may infer from the facts of this case that the Court of Appeal found such injury or tendency for injury.

i. Appellant mischaracterizes Respondent's interest as being that of the disciplinary memorandum complying with the CBA.

Appellant relies on the dissent for the proposition that "an unsigned disciplinary memorandum could not have injured the employer's interests because 'the employer's interests were manifestly not involved in the violation of a union contract designed to protect the employee.'" (AOB at p. 28; *Paratransit, supra,* 206 Cal.App.4th at pp. 1333-1334 (dis. opn. of Blease, J.).) Appellant misconstrues the underlying circumstances relating to the order to sign the disciplinary memorandum where the employer's interest was in having a lawful and reasonable order obeyed by an employee.

Under the facts of this case, harm to Respondent's interest cannot simply be framed in terms of compliance with the CBA. First, it is not within a court's prerogative to determine whether this CBA has been violated; rather, such role is expressly reserved for an arbitrator skilled at labor contract interpretation, as provided for in the grievance procedure:

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. [Citations.] But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. [Citations.] Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract.

(*Republic Steel Corp. v. Maddox* (1965) 379 U.S. 650, 652-653, fns. omitted ["*Republic Steel Corp.*"].) Accordingly, here, Appellant's proper recourse was to sign the disciplinary memorandum as directed and then file

a grievance pursuant to the agreed upon grievance procedure. (CT 122-123 [*Ludlow, supra,* P-B-190 at pp. 3-4]; CT 45, 76-77.) The question of whether Respondent's disciplinary memorandum violates the terms of the CBA is unknown and will remain as such until all of the evidence concerning the negotiations and intent of the parties has been presented and submitted to an arbitrator for determination. (See *Republic Steel Corp.*, *supra*, 379 U.S. at pp. 652-653.)

Appellant's contention that an employer has no interest in violations of CBA provisions aimed at protecting the employee contradicts traditional principles of labor law. The employer always has an interest in complying with its CBA because opting to disregard such causes serious consequences for the employer in the form of grievances, unfair labor practice charges, and/or union strikes. (Hardin & Higgins, The Developing Labor Law (4th ed. 2001) § 1, p. 1454 ["Collective bargaining evidently functions as a method of fixing terms and conditions of employment only because the risk of loss to both parties from a strike can become 'so great that compromise is cheaper than economic battle.' (Citation.)"].) In short, any alleged CBA violation is irrelevant here because Respondent's interest was in having its lawful and reasonable order obeyed. (See POINT I.a., *supra.*)

> *ii. The Court of Appeal properly inferred that Respondent, as an employer, has a business interest in its employees obeying lawful and reasonable orders, and that such interest was injured, or tended to be injured, by Appellant's refusal to sign the disciplinary memorandum.*

In his opening brief, Appellant relies upon case law, CUIAB precedent benefit decisions, and the California Code of Regulations to support his contention that an employer has an affirmative burden to prove injury to its interests. Yet, courts and the CUIAB have routinely drawn reasonable inferences and made implied findings when determining

whether conduct harms an employer's interest for purposes of finding misconduct. Moreover, the California Code of Regulations does not support Appellant's position.

Rowe v. Hansen (1974) 41 Cal.App.3d 512 ("*Rowe*") is an example of a court properly inferring from the facts of a case that an employee's conduct was harmful to an employer's obvious interests. In *Rowe,* a waitress refused to comply with a company rule requiring sweaters to be worn with arms in the sleeves and not draped over the shoulders so as to prevent food contamination. (*Id.* at pp. 515-516.) During a single shift, the waitress was warned three times by her supervisor that she needed to wear her sweater properly, and each time the waitress refused to comply. (*Ibid.*) The waitress was then told to go home by her supervisor, but again refused to comply. Finally, the waitress was discharged for insubordination. (*Id.* at pp. 521-522.)

The *Rowe* court concluded that it was "*reasonable to infer from the facts thereby established* that petitioner's conduct was a manifestation of a persistent and enduring intractability that impresses her conduct with the character of insubordination, i.e., a willful, deliberate violation of reasonable orders of her employer." (*Rowe, supra,* 41 Cal.App.3d at pp. 522-533, emphasis added.)

Appellant improperly attempts to distinguish *Rowe* by arguing that, unlike the employee in *Rowe,* he did not speak to his employer in an inappropriate manner. Appellant's argument is unavailing. The outcome in *Rowe* did not turn on the manner in which the employee spoke to her supervisors; rather the court focused on the nature of the conduct, i.e., a direct challenge to the authority of the employer. Likewise, in the present case, Appellant directly challenged the authority of the Respondent's supervisors by defying their lawful and reasonable order to sign a memorandum acknowledging receipt of the document. Significantly, the

employee in *Rowe* asserted the identical argument Appellant asserts here, that is, that there was no evidence of injury to the employer's interests presented. Rejecting such an argument, the *Rowe* court stated:

> The record is devoid of evidence of immediate harm to the employer's economic interests. There was uncontradicted evidence that the incident did not create an obvious disturbance in the restaurant. There was no evidence of a loss of business as a direct result thereof. However, such harm as petitioner contends must be shown cannot be limited to immediate and direct economic consequences. *When the authority of those in whom the employer has confided responsibly for the day-to-day operation of the business is flouted, the interests of the employer suffer.*

(*Id.* at p. 523, emphasis added.) *Rowe* is directly applicable to the case at hand. Once it is determined that the employer's order was lawful and reasonable, it follows that in refusing to comply with such an order, the employee defies authority, commits insubordination, and that such conduct per se injures an employer's interest in running a business. In the present case, the Court of Appeal concluded, "Claimant's failure to sign the disciplinary memo violated his obligations to his Employer under Labor Code section 2856" and that the violation amounted to an act of insubordination. (*Paratransit, supra,* 206 Cal.App.4th at p. 1327.) In characterizing the circumstances of the meeting between Appellant and Respondent, the Court of Appeal explained, "Claimant was under a continuing obligation to comply with lawful and reasonable orders of his employer and otherwise not to engage in misconduct. This included during the meeting.... The Employer representatives were just reminding Claimant of what he should already know, i.e., that insubordination can result in discipline." (*Id.* at p. 1333.) Thus, the Court of Appeal could and did properly infer from the facts of this case that Appellant's

insubordination caused an obvious harm to the employer's interest in that its authority was flouted.

Contrary to Appellant's assertion, *Rowe* is not "against the weight of judicial authority." (AOB at p. 32.) Several other courts have drawn reasonable inferences from the facts of the individual case to conclude that obvious employer interests had been harmed. (See, e.g., *Drysdale v. Dept. of Human Resource Development* (1978) 77 Cal.App.3d 345, 356 [reasonable for the Board and the trial court to infer from the fact of plaintiff's recurring tardiness that her conduct was intentional and showed a substantial disregard for her employer's interests]; *Agnone v. Hansen* (1974) 41 Cal.App.3d 524, 528-529 [reasonably inferable from the evidence that plaintiff's failure to do assigned tasks showed an intentional and substantial disregard of the employer's interests and of the plaintiff's duties and obligations to her employer and that it could further be inferred that plaintiff knew or reasonably should have known that such continuing conduct would result in substantial detriment to the interests of the employer].)

Moreover, Appellant's reliance on *Steinberg v. Unemployment Ins. Appeals Bd.* (1978) 87 Cal.App.3d 582 ("*Steinberg*") and *Thornton v. Dept. of Human Resources Development* (1973) 32 Cal.App.3d 180 ("*Thornton*") for the proposition that, "California courts twice have held that an employee's violation of an employer's order was not misconduct because the employer did not prove injury to interest" (AOB at p. 28) is misdirected. Specifically, *Steinberg* addressed the issue of whether or not the employee voluntarily quit her job; it did not consider any issues related to misconduct. (*Steinberg, supra*, 87 Cal.App.3d at p. 587 ["Misconduct not being applicable the discharge entitled the employee to unemployment compensation."].) In *Steinberg,* a clerk-typist was instructed to speak with a co-worker with whom she had not spoken in months. She refused, on the

ground that it affected her health, and voluntarily left her job. (*Id.* at pp. 588-589.) The Court of Appeal reversed the lower court's finding that the employee was not entitled to unemployment benefits, holding that the record did not establish that coworker communication was an expected or required condition of employment and that the employer's order to converse, in light of the particular facts of the case, was not reasonable. (*Steinberg*, *supra*, 87 Cal.App.3d at p. 587.)

It is interesting to note that, in so holding, the *Steinberg* court "observe[d] an *implicit* finding that the 'silent treatment' was detrimental to the running of the business involved." (*Steinberg*, *supra*, 87 Cal.App.3d at p. 587, emphasis added.) Thus, *Steinberg* further demonstrates that it is appropriate for courts to draw reasonable inferences in determining eligibility for unemployment insurance benefits when the facts of the individual case support such findings.

Appellant's reliance upon *Thornton* is similarly misplaced. Contrary to Appellant's assertion, the *Thornton* court did not hold that a refusal to shave a beard was not misconduct *because* the employer failed to prove injury to its interests. (AOB at p. 29.) Rather, the court held that based on the facts of the case, the evidence did not permit an inference that the order was reasonable. (*Thornton*, *supra*, 32 Cal.App.3d at p. 186.) The employer had no rule pertaining to shaving beards and had never previously directed the employee to shave before he was fired. (*Ibid.*) The court mentioned that the order "would [have been] reasonable if motivated by evidence that the beard was detrimental to the employer's business interests *or* was unsanitary," but that "there was no testimony from the employer as to why he fired the Appellant." (*Ibid,* emphasis added.) Thus, *Thornton* is factually and analytically distinguishable from the case at hand because the *Thornton* court focused on the "new and unreasonable" aspect of the employer's order as well as whether the order improperly infringed upon

the employee's constitutional rights to wear his beard under the facts of the case. No such constitutional issue exists in this case, nor can Appellant assert that the order that he sign a disciplinary memorandum "As to Receipt" was "new and unreasonable" given his charged knowledge of the CBA, which governed his employment, as well as his prior receipt and signature of a disciplinary memorandum. (CT 54, 67, 78.)

Next, Appellant relies on three CUIAB Precedent Benefit decisions, *Matter of McCoy* (1976) P-B-183, *Matter of Santos* (1970) P-B-66, and *Matter of Thaw* (1977) P-B-362, to support his assertion that the employer must prove injury to its interests, all of which are inapposite. Specifically, *Matter of McCoy* is distinguishable from the case at hand because it turned on whether or not the order to cease discussions of opening a competing business was reasonable. (*Matter of McCoy*, *supra*, P-B-183 at p. 2.) The case does not provide authority for the proposition that the employer must prove injury to its interests as an independent element of misconduct.

Matter of Santos and *Matter of Thaw* both dealt with an employee who refused to follow an order to shave or trim his beard thereby triggering questions concerning the employee's First Amendment rights under the United States Constitution. Both were "grooming cases," which implicated the "Bagley Test," a balancing of constitutional rights against an employer's interests. (*Matter of Thaw, supra,* P-B-362 at p. 5.) Thus, *Matter of Santos* and *Matter of Thaw* are inapplicable to Appellant's case as they apply a test based on constitutional rights rather than basic misconduct.

Appellant ignores the merits and application of precedent decisions that are applicable in this matter, *Matter of Ludlow* (1976) P-B-190 and *Matter of Gant* (1978) P-B-400, by dismissing them in a footnote and asserting that interest to the employer was not discussed therein. (See AOB at p. 30, n .5.) However, such an assertion is inaccurate. In *Matter of Gant*,

the Board noted that misconduct should "evince a disregard of the employer's interests," but nonetheless found misconduct without further discussing injury to employer interests. (CT 139-140 [*Matter of Gant*, *supra*, P-B-400 at pp. 3-4].) In so finding, the Board cited to *Matter of Ludlow* for the proposition that, "[D]eliberate disobedience of lawful and reasonable instructions is misconduct, and that if the employees doubt the reasonableness or legality of supervisors' instructions, they should seek redress through other avenues than disobedience." (CT 139 [*Matter of Gant*, *supra*, P-B-400 at p. 3].)

In sum, *Matter of Gant* and *Matter of Ludlow* are not inapposite as Appellant suggests, but instead support Respondent's position that once the order is deemed lawful and reasonable, and the employee disobeys, injury to the employer's interests may be implied.

Lastly, Appellant offers a strained reading of the California Code of Regulations to argue that "the comments to the unemployment regulations state that the employer must prove harm to its interest." (AOB at p. 30.) Nowhere in the regulations relating to discharge for misconduct does it state that the employer has the burden of proving injury to its interests. The Legislature must have intentionally omitted language pertaining to burdens of proof from the section entitled, "Discharge for Misconduct-General Principles," since it specifically included such language in section 1253(c)-1 governing the "Availability of Work- General Principles." Specifically, section 1253(c)-1, subdivision (d) is entitled, "Burden of Proof." (*In re Ethan C.* (2012) 54 Cal.4th 610, 638 [when language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests the omission was purposeful]; *Penasquitos, Inc. v. Superior Court* (*Bismonte*) (1991) 53 Cal.3d 1180, 1188-1189 ["Where a statute, with reference to one subject contains a given provision, the

omission of such provision from a similar statute concerning a related subject...is significant to show that a different intention existed."].)

Appellant cites inapplicable comments to the Code of Regulations, title 22, section 1256-36, neither of which provide authority for his position that the employer must prove injury to its interest. Specifically, he cites an excerpt of "Example 6"[6] of section 1256-36 relating to insubordination as a result of extreme employee conduct including "ridicule" and "heated arguments" in the presence of others. (AOB at p. 30.) Said excerpt was included in the comments as an illustration of section 1256-36, subdivision (b)(3) which deems statements or remarks that are not the result of a good faith error and that damage or tend to damage the employer's interest a form of insubordination. Section 1256-36, subdivision (b)(3) does not apply to the present case. Rather, the Court of Appeal correctly applied section 1256-36, subdivision (b)(1) which states:

> Implicit in the agreement of hire is the concept that an employee is subject to some degree of authority exercised by the employer or the employer's representatives. An employee is insubordinate if he or she intentionally disregards the employer's interest and willfully violates the standard of behavior which the employer may rightfully expect of employees in any of the following ways: (1) Refuses, without justification, to comply with the lawful and reasonable orders of the employer or the employer's representative.

(*Paratransit, supra,* 206 Cal.App.4th at p. 1326.) Similarly, Appellant also cites to "Example 3"in the comments for section 1256-36 (AOB at p. 30) but such was intended to illustrate an example of section 1256, subdivision (b)(1)(C) that pertains to compliance with a lawful and reasonable order not being required if "the order is unreasonable because it does not relate to or affect the employer's business interests."

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[6] In his Opening Brief, Appellant cites to "Example 6," but his quoted excerpt is actually from the comment section to Example 7.

The California Code of Regulations, title 22, section 1256-30, subdivision (b) references the "elements of misconduct," but even here the Legislature does not include language imposing a burden on the employer to prove each one of the elements. This section only indicates that the elements should be "present." Moreover, the comment interpreting section 1256-30, subdivision (b) indicates there is a very low threshold needed for "injury" to be considered "present":

> Paragraph (4) of subdivision (b) requires that the claimant's actions injure or tend to injure the employer's interests. Acts which tend to injure the employer's interests are acts on the claimant's part that could possibly cause financial loss, or loss of business, property, or customers, and damage incurred such as disruption of production, of normal lines of communication or control, or discipline. The employer does not have to actually suffer any financial loss or a loss of control or discipline or a slow-down in production by the claimant's actions. It is *sufficient* if the claimant's actions *logically and reasonably* injure or tend to injure the employer's interests.

(Cal. Code Regs., tit. 22, § 1256-30, com., emphasis added.) As demonstrated above, if the Legislature intended to place an affirmative burden on the employer to prove injury to its interests, it could have done so just as it included such language in the "Availability Of Work" section. (*Id.* at § 1253(c)(1), subd. (d).)

Based on the foregoing, the Court of Appeal correctly made an implied finding based on the evidence presented that Appellant defied his employer's authority by refusing to obey a lawful and reasonable order and that such conduct amounted to insubordination of a kind that sufficiently injured or tended to injure Respondent's interests.

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POINT III

CONTRARY TO APPELLANT'S ASSERTION, THE COURT OF APPEAL PROPERLY CONSIDERED HIS SUBJECTIVE BELIEFS IN CONNECTION WITH HIS REFUSAL TO SIGN THE DISCIPLINARY MEMORANDUM AND THUS DID NOT ERR IN APPLYING THE GOOD FAITH ERROR IN JUDGMENT ANLAYSIS SET FORTH IN *AMADOR V. UNEMPLOYMENT INSURANCE APPEALS BOARD*

In *Amador, supra,* 35 Cal.3d 671, this Court stated that, "[a] claimant may not be denied benefits solely on the basis of 'a good faith error in judgment.'" (*Id.* at p. 679 [citations omitted].) This Court explained that, in determining whether the employee has shown good cause for his actions, "the board must take account of real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action and always an element of good faith." (*Ibid.*) *Amador* held that the employee therein who had willfully refused to perform work which she believed would jeopardize the health of others, did so for good cause; therefore, she had, "at the very worst made a good faith error in judgment' and was not disqualified for unemployment benefits." (*Id.* at p. 681 [citation omitted].)

Here, Appellant asserts that the Court of Appeal erred by limiting its analysis to the terms of Respondent's directive to sign the disciplinary memo and by considering the evidence using an objective, rather than a subjective, standard to account for Appellant's point of view. (AOB at p. 34.) Appellant's assertion is misplaced.

In the present case, the Court of Appeal stated that, "where an employee, in good faith, fails to recognize the employer's directive is reasonable and lawful **or** otherwise reasonably believes he is not required to comply, one might conclude his refusal to obey is no more than a good

faith error in judgment." (*Paratransit, supra,* 206 Cal.App.4th at p. 1328; emphasis added.)

Appellant interprets the Court of Appeal's analysis as "improperly limit[ing] good faith error in judgment to misunderstanding the terms of the order itself." (AOB at p. 35). In doing so, Appellant focuses too intently on the first prong of the Court of Appeal's statement and not enough on the second prong, which shows that the analysis is not limited to the terms of the order and also clearly encompasses a consideration of the employee's subjective beliefs in accordance with *Amador*. As demonstrated above, in reviewing the trial court's ruling, the Court of Appeal properly examined the record by applying the substantial evidence test. The Court of Appeal examined the evidence pertaining to Appellant's subjective point of view and ultimately concurred with the trial court that Appellant's proffered excuses for not complying with Respondent's order to sign the memo were meritless. (*Paratransit, supra,* 206 Cal.App.4th at pp. 1330-1333.)

Contrary to Appellant's contention, the Court of Appeal's analysis did not "preclude consideration" of facts such as Appellant was tired after a day at work, he was confused by Respondent's reference to an incident occurring six years prior, or that he believed he was entitled to a union representative. (AOB at p. 35.) The Superior Court and the Court of Appeal considered Appellant's contentions, but simply did not believe them. The Court of Appeal even went so far as to characterize Appellant's contention that he refused to sign because he was confused by the absence of specific language on the memo, as a "false narrative." (*Paratransit, supra,* 206 Cal.App.4th at p. 1329.)

Moreover, as for Appellant's alleged tiredness and confusion relating to a six-year-old lie, the Court of Appeal fulfilled its duty under the substantial evidence test and concluded, "[W]hile Claimant may well have been tired at the end of his shift and may have been reminded at the

meeting about his earlier lie on his employment application, these matters were known to the trial court, who nevertheless concluded they were not sufficient to establish a good faith error in judgment. We cannot say on this record the court erred in this regard." (*Paratransit, supra,* 206 Cal.App.4th at p. 1331.) During the investigation for the underlying sexual harassment claim against Appellant, Respondent found Appellant's answers to be evasive and at times untruthful. (CT 88.) Consequently the verbal "stray remark" to Appellant's six-year-old lie and the reference to it generally in the written memo served to remind Appellant that his credibility has been subject to doubt on several prior occasions during his employment. (CT 88; *Paratransit, supra*, 206 Cal.App.4th at pp. 1332-1333.)

The Court of Appeal specifically addressed his concerns: "We presume official duty has been regularly performed and that the trial court considered all relevant evidence. Claimant has not demonstrated otherwise here. He merely assumes that, because the court ruled against him, it must not have considered these matters." (*Paratransit, supra,* 206 Cal.App.4th at p. 1329.) In asserting the same argument as he did in the Court of Appeal, Appellant again merely assumes that because the Court of Appeal ruled against him, it must not have considered his subjective beliefs. The trial court made credibility determinations to conclude that Appellant' subjective beliefs were not legitimate and the Court of Appeal affirmed based on the substantial evidence test. As the court explained in *Lacy, supra*,17 Cal.App.3d at p. 1134,

> The Appellants now ask the appellate court to superimpose its own—and supposedly more authoritative—characterization upon the cryptically described conduct. [¶] The request assumes a scope of appellate review broader than a California appellate court possesses. While the superior court exercises its independent judgment on the administrative evidence, California law accords the appellate court a much narrower scope of review, confining it to an inquiry whether the

> superior court's findings are supported by substantial evidence.

(*Id.* at p. 1134 [citation omitted].) In the present case, Appellant would have preferred the Court of Appeal to reinterpret the evidence relating to Appellant' subjective beliefs, but such was already properly considered by the trial court and affirmed by the Court of Appeal using the substantial evidence test.

Finally, the Court of Appeal did not ignore the overarching public policy of the Unemployment Insurance Code as articulated in section 100. Unemployment insurance benefits are intended to ease the suffering caused by unemployment for those who are unemployed through no fault of their own. Consequently, the Court of Appeal stated that "fault [was] therefore the basic element for considering and interpreting the Unemployment Insurance Code." (*Paratransit, supra,* 206 Cal.App.4th at p. 1328.) Again, just because the Court of Appeal held against Appellant does not mean it ignored the fundamental principles underlying the Unemployment Insurance Code.

In sum, the Court of Appeal did not err in applying the good faith error in judgment test as set forth in *Amador, supra,* 35 Cal.3d 671.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeal should be affirmed.

DATED: March 29, 2013.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.204(c)(1)]

The text of the Respondent's Answer Brief consists of 12,360 words as counted by the Microsoft Word program used to generate this Brief.

DATED: March 29, 2013.

Respectfully submitted,

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By _____
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HOW ARBITRATION WORKS

Seventh Edition

Kenneth May
Editor-in-Chief

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However, in another case where the evidence indicated that the employer's work rule requiring the immediate reporting of work-related accidents was not uniformly enforced, an arbitrator reversed the discharge of an employee who had failed to report his "slip and fall" on some ice before the end of his shift because he did not think he had been injured.[165]

5. REFUSAL TO OBEY ORDERS—THE SAFETY AND HEALTH EXCEPTIONS

A. Safety and Health Exception to the Obey Now–Grieve Later Doctrine [LA CDI 118.659; 118.6521; 100.552540; 100.552575]

It is a well-established principle that employees (1) must obey management's orders and carry out their job assignments, even if such assignments are believed to violate the agreement; and (2) then turn to the grievance procedure for relief.[166] An exception to this "obey now–grieve later" doctrine exists where obedience would involve an unusual or abnormal safety or health hazard.[167] But this exception has been held inapplicable where the hazard is inherent in the employee's job.[168] Moreover, when the exception is invoked, the employee must show that a safety or health hazard was the real reason for the refusal,[169] and that the alleged hazard existed at the time of the employee's refusal.[170]

The exception may apply as well where the employee asserts that to perform as ordered would jeopardize the safety of others.[171] However, even assuming that there is a safety hazard sufficient to justify an employee's refusal to perform the work assigned, this right of refusal applies only to the employee assigned to do the work; other employees not assigned the work (and not affected by the unsafe

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matic" terminable offense, and employer could not recall any other employee who had been discharged for violating same rule).

[165]Luzenac Am., 121 LA 1089 (Abrams, 2005) ("company rules that are not systematically enforced are not rules at all").

[166]*See* Chapter 5, section 14.A., "Use of Grievance Procedure Versus Self-Help."

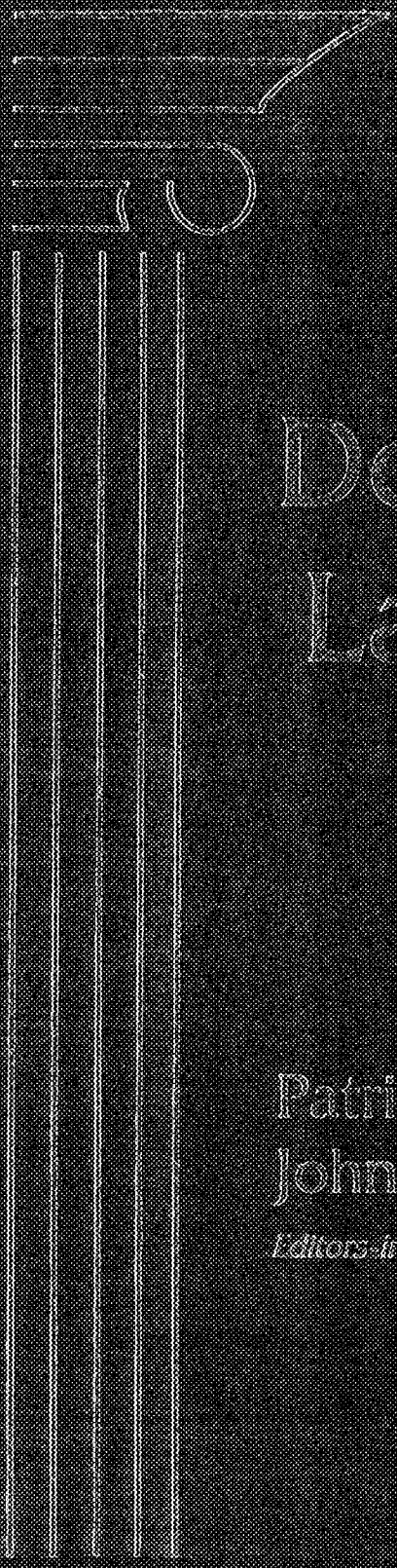
[167]*See* Leland Oil Mill, 91 LA 905, 907 (Nicholas, Jr., 1988); West Penn Power Co., 89 LA 1227, 1230–32 (Hogler, 1987); Gillette Co., 79 LA 953, 961–62 (Bard, 1982); T&J Indus., 79 LA 697, 702 (Clark, 1982); Jacksonville Shipyards, 79 LA 587, 590 (McCollister, 1982).

[168]*See* Consolidated Edison Co. of N.Y., 71 LA 238, 240, 243 (Kelly, 1978); Tenneco Chems., 48 LA 1082, 1084 (House, 1967); Alliance Mach. Co., 48 LA 457, 461 (Dworkin, 1967); Duval Corp., 43 LA 102, 105 (Meyers, 1964); Bethlehem Steel Co., 41 LA 1323, 1326 (Porter, 1963).

[169]*See* Tenneco Chems., 48 LA 1082, 1084–85 (House, 1967); Goodrich-Gulf Chems., 48 LA 963, 965 (Rohman, 1967); Alliance Mach. Co., 48 LA 457, 461 (Dworkin, 1967).

[170]City of Los Angeles, Cal., 111 LA 406 (Daly, 1998).

[171]A.M. Castle & Co., 41 LA 666, 670 (Sembower, 1963).



The Developing Labor Law

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a primary strike, could be regarded as a tort insofar as it constituted deliberate infliction of economic harm upon an employer, it was deemed justified, that is, lawful, if the strikers were pursuing appropriate interests,[1] such as higher wages, reduced working hours, and improved working conditions.[2] Justice Holmes explained:

> If it be true that [workers] may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.[3]

The common law right to strike was echoed in labor legislation. Collective bargaining, the keystone of federal labor law, presupposes the availability to the parties of certain economic weapons. The Supreme Court has explained that "the presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[4] Collective bargaining evidently functions as a method of fixing terms and conditions of employment only because the risk of loss to both parties from a strike can become "so great that compromise is cheaper than economic battle."[5]

The primary strike is preeminent. But as with so many other labor law terms, it is difficult to frame a precise legal definition of a strike. The Taft-Hartley Act provided the following definition:

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[1]PROSSER, LAW OF TORTS 962–69 (1971); GREGORY, LABOR AND THE LAW 108 (1961); *see generally* Chapter 1, "Historical Background of the Wagner Act."

[2]See cases collected at Annot., *Purposes for Which Strike May Lawfully Be Called*, 71 L.Ed. 248 (1928).

[3]Vegelahn v. Guntner, 167 Mass. 92, 108, 44 N.E. 1077 (1896) (Holmes, J., dissenting). *See also* American Steel Foundries v. Tri-City C.T. Council, 257 U.S. 184, 208–09 (1921), in which Chief Justice Taft wrote: "Is interference of a labor organization by persuasion and appeal to induce a strike against low wages, under such circumstances, without lawful excuse and malicious? We think not .... The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital."

[4]N.L.R.B. v. Insurance Agents (Prudential Ins. Co.), 361 U.S. 477, 489, 45 LRRM 2704 (1960). For discussion of this case, see Chapter 13, "The Duty to Bargain," Section V. [Economic Pressure During Bargaining]." *See also* Section III.A.3. [Unprotected and Prohibited Strikes; Unlawful or Wrongful Means; Partial and Intermittent Strikes], *infra*, at note 144.

[5]COX, BOK, GORMAN & FINKIN, LABOR LAW CASES AND MATERIALS 469 (12th ed. 1996).

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 555 Capitol Mall, Suite 1240, Sacramento, California 95814.

On March 29, 2013, I caused to be served the within **RESPONDENT'S ANSWER BRIEF ON THE MERITS** in *Paratransit, Inc. v. Unemployment Insurance Appeals Board; Craig Medeiros*; California Supreme Court Case No. S204221 [Third Appellate Dist. Ct. of Appeal Case No. C063863; Sac. County Sup. Ct. Case No. 34-2009-80000249-CU-WM-GDS] by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 29th day of March 2013, at Sacramento, California.

LORRAINE L. RENFROE