S204221

IN THE SUPREME COURT OF CALIFORNIA

PARATRANSIT, INC.
Respondent,

V.

UNEMPLOYMENT INSURANCE BOARD
Respondent,

CRAIG MEDEIROS
Petitioner and Real Party in Interest and Appellant.

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

Appeal from a Judgment of the Superior Court,
County of Sacramento
Hon. Timothy M. Frawley, Presiding
Case No. 34-2009-80000249

APPELLANT'S REPLY BRIEF

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INTRODUCTION

It is undisputed that appellant Craig Medeiros was terminated from his employment and subsequently denied unemployment insurance benefits solely for refusing to immediately sign a disciplinary memorandum. That memorandum violated important rules under the collective bargaining agreement (CBA) designed to protect employees from making harmful admissions.

It is further undisputed that, as the trial court found and the Court of Appeal majority agreed, Mr. Medeiros did not sign the memorandum because he feared that signing it would admit conduct he strongly contested and he wanted to consult with a union representative before signing. (Clerk's Transcript on Appeal (CT), 472; *Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2012) 206 Cal.App.4th 1319, 1323, 1327.)

Paratransit devotes substantial attention to unfounded, unlitigated, and unproven alleged prior conduct by Medeiros that was not the basis for his termination or the finding of misconduct. These allegations have no bearing on the issues and are nothing more than an effort to distract the Court from the relevant authorities and proper legal analysis. (*See Silva v. Nelson* (1973) 31 Cal.App.3d 136, 140-41 [conduct that is not the basis for discharge cannot be the basis for misconduct finding].)

Medeiros's refusal to sign the disciplinary memorandum was not misconduct within the meaning of the unemployment insurance law for three independent reasons: 1) Paratransit's demand to sign it was unlawful and unreasonable as a matter of law; 2) no employer interest was harmed; and 3) Medeiros acted in good faith.

Paratransit obligated itself in the CBA to disciplinary procedures it would follow and to the content of the disciplinary memorandum in particular. Yet, Paratransit urges the Court to ignore its violation of that obligation and affirm the Court of Appeal's majority that applied the wrong standards, ignored established law, assumed facts not in the record, and fell short of its duty to construe the law to the benefit of unemployed workers. The Court should reject that invitation and reverse the Court of Appeal's decision.

ARGUMENT

I. MEDEIROS DID NOT COMMIT MISCONDUCT BECAUSE HE DID NOT HAVE A DUTY TO OBEY PARATRANSIT'S UNLAWFUL AND UNREASONABLE ORDER ISSUED IN VIOLATION OF THE CBA.

Absent a duty to obey an employer's order, there is no misconduct. Absent a lawful and reasonable order, there is no duty to obey. On these points, the parties agree. The threshold question

in this matter is therefore whether the order to sign the disciplinary memorandum was lawful and reasonable. Paratransit's arguments that its breach of the CBA is irrelevant to this question and that its order to Medeiros to sign the memorandum it presented him was lawful and reasonable are contrary to undisputed facts and settled law, and are unsupported by the authorities on which Paratransit relies.

A. An order to sign a disciplinary memorandum that *directly* contravenes express provisions of a CBA about disciplinary memoranda is unlawful and unreasonable and cannot establish misconduct.

Paratransit argues that breach of a CBA does not render a corresponding order unlawful or unreasonable and is irrelevant to the misconduct analysis. (Respondent's Answer Brief on the Merits [RAB], p.10.) This argument disregards precedent and misconstrues the authorities Paratransit relies on. Paratransit ignores that this order did not merely expand the general scope of Medeiros's employment duties, but directly contradicts an express term of the CBA governing his employment.

1. *May v. New York Motion Picture Corp.* and *Moosa v. State Personnel Board* apply.

May v. New York Motion Picture Corp. (1920) 45 Cal.App. 396 established a two-step framework to evaluate an employee's duty to obey an order, asking: 1) whether the order is consistent with

the contract;[1] and 2) if it is, whether the order is reasonable. (*Id.* at p.405.)

Paratransit urges the Court not to apply *May* because it is 93 years old and does not involve unemployment benefits. (RAB, p.13.) Neither is an adequate reason. First, *May's* age does not diminish its value. It highlights its longevity. *May* is the seminal California case on the duty of obedience and continues to be relied upon. (*See e.g. Mason v. Lyl Productions* (1968) 69 Cal.2d 79, 87; *Moosa v. State Personnel Bd.* (2002) 102 Cal.App.4th 1379, 1387.)

Second, although *May* is not an unemployment case, it did not limit its analysis to wrongful discharge, but evaluated an employee's duty of obedience generally. "The relation of the master and servant . . . cast certain duties upon plaintiff, as the servant, the principal one was that of obedience to all reasonable orders of the defendant, the master, *not inconsistent with the contract.*" (*May, supra,* 45 Cal.App. at p.402 [emphasis added].) The *May* framework applies in evaluating an employee's duty of obedience in the unemployment context. Unemployment law must be construed liberally to benefit unemployed workers. (*Amador v. Unemployment*

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[1] Paratransit does not contest that a CBA is a contract that governs the terms of the employment relationship. (*See* RAB, p. 14; *see also Douglas Aircraft Co. v. California Unemployment Ins. Appeals Bd.* (1960) 180 Cal.App.2d 636, 646.)

Ins. Appeals Bd. (1984) 35 Cal.3d 671, 683.) It makes no sense to depart from this standard and disregard the fact that an employer's order breaches the employment contract.

Next, Paratransit argues that in *May* the employee's duties were entirely embodied in a written contract whereas here the Labor Code and employee handbooks also governed the relationship. (RAB, p.14.) Paratransit provides no factual basis for this position. Even assuming there were handbooks or other materials that governed Medeiros's employment, those materials would not override the CBA. (*J. I. Case Co. v. Labor Board* (1944) 321 U.S. 332, 339.) Additionally, nothing in *May* suggests that the employment relationship was not governed by statutes or other authority. In fact, every contract incorporates existing law. (*Alpha Beta Food Markets v. Retail Clerks Union Local 770* (1955) 45 Cal.2d 764, 771.)

Paratransit also argues that the California Unemployment Insurance Appeals Board (Board) has "consistently avoided application of *May*'s analytical framework." (RAB, p. 14.) To the contrary, the Board cited *May* with approval in *Matter of Anderson* for the proposition that "[t]he duty of an employee is to obey the employer's lawful and reasonable orders *within the scope of the contract of employment* ...." (*Matter of Anderson* (1968) P-B-3, p.6

[emphasis added].) Paratransit's argument that the Board was only saying that an employee had a duty to obey reasonable orders pursuant to Labor Code Section 2856 ignores the Board's clear language that the duty under Section 2856 is to obey an order "within the scope of the contract for employment." (*Anderson, supra* at p.6.) *Anderson* is the Board's interpretation of the duty of obedience both under the statute and case law.

Paratransit attempts to distinguish *Moosa v. State Personnel Board* (2002) 102 Cal.App.4th 1379 by arguing that it involved a public employee and the court reviewed the matter under Education Code Section 89535, not under Labor Code Section 2856. (RAB at 15-16.) These arguments are misplaced.

First, nothing in *Moosa* suggests that the plaintiff's status as a public, rather than a private, employee had any bearing on the court's conclusion. (*See Moosa, supra*, 102 Cal.App.4th at pp.1386-87.) The court held that because the order was inconsistent with the CBA, there was no duty to obey it. (*Id.* at p.1387.)

Second, the *Moosa* court did not confine itself to analyzing what constitutes "unprofessional conduct" or "normal and reasonable duties" under the Education Code. Instead, the court relied on *May* for "general principles of California employment law" that an employee's duty of obedience extends to all reasonable

orders "not inconsistent with the contract." (*Moosa*, *supra*, 102 Cal.App.4th at p. 1387.) If the court meant to establish a special rule for public employees alone, it would have been inappropriate to cite *May*, a private employment case.

Third, Labor Code Section 2856 does not render *Moosa* inapplicable. Where an employer's demand violates the CBA, it is both new and unreasonable as a matter of law under Labor Code Section 2856. *Moosa* held the employer's order unreasonable as a matter of law because it exceeded the "normal and reasonable" duties required under the CBA. (*Moosa*, *supra,* 102 Cal.App.4th at p.1387.) Paratransit's demand, likewise, was not only new, but affirmatively violated the CBA. It is unreasonable under *May* and *Moosa*.

An employer should not be allowed to violate the terms of a CBA or employment contract and hide behind the general principle in Labor Code Section 2856, which does not identify what constitutes a reasonable order. Paratransit cites no case holding that Section 2856 insulates an employer that violated a governing contract or CBA from an unemployment insurance claim. The Court should reject an interpretation that provides employers carte blanche to issue orders that directly violate the terms of the employment agreement under the guise of "reasonableness." To allow an

employer to evade liability for unemployment insurance in such a manner would perversely reward an employer for violating contract terms to which it has expressly obligated itself.

2. Neither *Ludlow* nor *Gant* support Paratransit's argument.

Paratransit relies on *Matter of Ludlow* (1960) P-B-190 to avoid an inquiry into its non-compliance with the CBA. (RAB, pp.11-12.) *Ludlow*, however, did not analyze whether the order at issue there violated a CBA. The Board found misconduct where an employee refused an order to perform duties he believed were outside his job classification. (*Ludlow*, *supra*, P-B-190, pp.3-4.) There is no mention of a CBA anywhere in the decision. *Ludlow* is not authority for an issue the Board did not address or have occasion to discuss. "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered." (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680.)

Furthermore, *Ludlow* is distinguishable. Paratransit speculates that the task the employee was ordered to perform, dusting fire extinguishers, might have been outside his job classification and therefore the order may have violated a CBA. (RAB, p.12 n.2.) Again, there is no mention of a CBA anywhere in

the decision. *Ludlow* only involves ordering an employee to perform a task that was not in the list of tasks in the job classification. It did not involve an order directly violating a CBA or any other employment agreement and is not a situation in which the alleged duty to sign the disciplinary memorandum was created by the CBA in the first place. In contrast, Paratransit's order directly violated the CBA by requiring Medeiros to sign the disciplinary memorandum even though it did not comply with express requirements of the CBA that created a duty to sign disciplinary memoranda.

The only other authority Paratransit cites is *Matter of Gant* (1978) P-B-400. It is even less availing. In *Gant*, the alleged misconduct was not following instructions to check the windshield wipers and defrosters on trucks in an assembly line. (*Gant*, *supra*, P-B-400, p.2.) A collateral issue was whether the employer's failure to follow its six-step disciplinary procedure prior to discharging the employee was relevant. (*Id.* at p.4.) The Board held that the employee committed misconduct regardless of whether the discharge complied with the disciplinary procedure because entitlement to benefits is not subject to private agreement. (*Id.*) There was no allegation that the order itself violated an agreement and the Board was not called upon to nor did it analyze the impact if it had. (*See id.* at pp.2-4.) Likewise, there was no allegation in *Gant* that the

order was unlawful or unreasonable, and the Board did not analyze that issue. Again, *Gant* is not authority for questions the Board had no occasion to address. (*See Kinsman*, *supra*, 37 Cal.4th at p.680.)

Unlike *Gant*, here the order itself violated the CBA and the issue is whether the order is lawful and reasonable. Moreover, a binding and enforceable CBA is not analogous to an internal discipline procedure policy unilaterally adopted by the employer. As noted by the treatise Paratransit cites, collective bargaining is a "method of fixing terms and conditions of employment . . . ." (Hardin & Higgins, The Developing Labor Law (4th ed. 2001), p.1454; *see also Douglas Aircraft, supra*, 180 Cal.App.2d at p.646.) An employer's progressive disciplinary policy does not govern the terms of employment, only the consequences of alleged violations. Consequently, such a policy does not bear on whether an employer's order is lawful and reasonable. However, the terms and conditions of employment form part of the employment contract, giving employer and employee rights and corresponding obligations. The terms and conditions of employment not only bear on, but define both an employer's authority to give an order and an employee's duty to obey.

Paratransit agreed in the CBA to limit its authority to ordering its employees to sign only disciplinary memoranda that complied

with the CBA. Paratransit should not have free rein to flout obligations it imposed on itself in agreeing to the terms and conditions of the CBA governing when and how Paratransit would discipline employees.

B. The order breached the express terms of the CBA.

1. The breach of the CBA is a question of law.

There are two problems with Paratransit's argument that the Court of Appeal's holding that the disciplinary memorandum did not violate the CBA is entitled to deference. (RAB, p.24.) First, the Court of Appeal majority expressly side-stepped the question, calling it a "red herring." (*See Paratransit, supra*, 206 Cal.App.4th at p.1327.) Second, interpretation of the CBA is a question of law subject to de novo review. (*See California Sch. Employees Ass'n v. Tustin Unified Sch. Dist.* (2007) 148 Cal. App. 4th 510, 522.) Paratransit argues "[a]ppellant 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." (RAB, p.25.) Whatever that statement means, to the extent Paratransit argues that extrinsic evidence is necessary or properly considered to interpret the CBA or the disciplinary memorandum, Paratransit is wrong. The language of the CBA is clear, direct and unambiguous. Extrinsic evidence is not necessary

to interpret it or to determine what must be stated in a disciplinary memorandum.

Likewise, no extrinsic evidence is necessary to determine whether the undisputed language in the disciplinary memorandum complies with what the CBA requires. The argument here is not over what the signature block said, but whether what it said is what the CBA requires.

The extrinsic evidence Paratransit points to, including its self-serving interpretation of the disciplinary memorandum and the CBA and its oral assurances to Medeiros that his signature would not be an admission, is irrelevant to the meaning of the unequivocal terms of the CBA. Such evidence is beside the point. It does not serve to interpret the legal meaning or effect of the CBA's unequivocal language. That is a matter within the sole province of the Court.

Moreover, neither the trial court nor Court of Appeal used extrinsic evidence to interpret the CBA. The trial court interpreted the CBA on its face and concluded that "only acknowledging receipt" and "not admitting to any fault or to the truth of any statement" were "different sides of the same coin." (CT 476; *see Paratransit, supra,* 206 Cal.App.4th at pp.1319, 1324.) The trial court did not use extrinsic evidence to reach this conclusion. (*See* CT 476.) The court discussed the prior disciplinary memo and

Paratransit's statement that signing was not an admission only in the context of good faith, not to interpret the CBA. (*Id.*) The Court of Appeal also only discussed Paratransit's statements and the prior disciplinary memorandum in the context of good faith error in judgment. (*See id.* at pp.1327-1328.)

There is no trial court finding based on extrinsic evidence that merits deference.

2. The disciplinary memorandum does not conform to the demands of the CBA.

Paratransit contends that, despite the express language of Section 54, the CBA does not require specific language in a disciplinary memorandum. Paratransit asserts that it requires only 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 an admission of fault." (RAB, p.25.) Paratransit brushes aside its failure to include the wording the CBA requires in the disciplinary memorandum as merely a "technical" violation of the CBA. (*Id.* at p.23.)

On its face, the argument is absurd. It is a tortured interpretation of straightforward and unambiguous language. The CBA provides that an employee must sign all disciplinary notices

"*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." (CT 00076-00077 [emphasis added].) Paratransit's argument that the CBA only requires that Paratransit not suggest that the notice will be used as an admission of fault turns the CBA's plain language on its head and inside-out. Paratransit would have the Court rewrite the CBA. "Neither a trial nor appellate court has the power to rewrite a contract." (*Simons v. Young* (1979) 93 Cal.App.3d 170, 185.)

The disciplinary memorandum fails to meet even Paratransit's topsy-turvy characterization of the CBA's requirements. Paratransit agrees that the CBA requires "the disciplinary memorandum set forth that the employee's signature will *only* be considered for the purpose of acknowledging receipt of the document . . . ." (RAB, p. 25 [emphasis added].) The disciplinary memorandum Medeiros was ordered to sign merely states, "Employee Signature as to Receipt." (CT 00073-00074.) The word "only"—and any other limiting language, such as "solely" or "exclusively"—is conspicuously absent. (*Id.*) The notice does not contain the assurance that the signature will only be used to acknowledge receipt, which Paratransit concedes the CBA requires.

Finally, as Justice Blease noted in his dissent, Paratransit ignores that the "the explicit written notice required by the collective bargaining provision is there for a reason, to negate any adverse inference, an inference not ruled out by the statement [in the memorandum] 'Employee Signature As To Receipt.'" (*Paratransit, supra*, 206 Cal.App.4th at pp.1333-34 [dis.opn. of Blease, J.].) Paratransit fails to address any of Medeiros's arguments on this front and fails to respond to his arguments that signing the disciplinary memorandum could expose him to liability to third parties.

For these reasons, Paratransit's failure to comply with the obligations it assumed under the CBA is not merely technical. It is substantive, significant and with potentially serious consequences. The provision bargained for provides express protection. The disciplinary memorandum provides at best implied protection and, at worst, constitutes an admission of allegations Medeiros strongly disputed. (*See* Appellant's Opening Brief (AOB), pp.22-26.) Paratransit's oral assurances to the contrary are meaningless because Paratransit had no control over whether an admission would be inferred by third parties had Medeiros signed the defective memorandum. (*See id.*)

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3. The 2004 disciplinary memorandum does not justify Paratransit's breach of the CBA in 2008.

Paratransit implies that the 2004 disciplinary memorandum should be considered in interpreting the CBA, stating that its handling of the 2008 disciplinary memorandum was "[c]onsistent with its handling of the 2004 disciplinary memorandum" when Paratransit also advised Medeiros that signing the memorandum was only an acknowledgement of receipt, not an admission of anything it stated. (RAB, pp.5-6.) The CBA that was in effect in 2004 is not in the record. There is no way to tell whether the way Paratransit handled the 2004 memorandum was consistent with or in violation of that CBA. If that CBA did require the same language in the disciplinary memorandum as the current CBA, there is no reason this prior CBA violation justifies the current CBA violation.

At most, the prior memorandum might be considered evidence of a past practice. However, a past practice can be binding on the parties only if it is "sufficiently definite by reason of its longevity, repetition and acceptability" that it has "become the accepted way of doing things." (*In Re Transamerica Deleval, Inc.* (1985) 84 LA 190, 192.) And past practice is only relevant if the CBA is silent or ambiguous about the matter in issue. (*Id.*) Neither

is true here. The CBA contains an explicit, unambiguous provision dealing with the content of disciplinary memoranda.

Even if the 2004 memorandum was inconsistent with a provision of the 2004 CBA, Paratransit introduced only this one prior instance, the 2004 disciplinary action. There is no evidence of longevity, repetition and acceptability. A single prior instance does not establish a binding past practice. (*See e.g. In Re City of Mattoon* (1995) 105 LA 44, 48 [seven prior instances in ten years and two instances in prior five years do not establish a binding past practice].)

Additionally, as explained in the AOB, the one prior instance is meaningfully different because the 2004 disciplinary memorandum stated signing was as to receipt "*only*," while the 2008 disciplinary memorandum did not say signing was *only* as to receipt. (AOB, pp.5, 22 n.4.) Nothing in the 2008 memorandum prevented it from being treated as an admission of the allegations contained in the memorandum.

C. The LMRA does not preclude the Court from reviewing Paratransit's breach of the CBA.

Paratransit contends that Medeiros's unemployment insurance claim is preempted by Section 301 of the Labor Management

Relations Act (LMRA), 29 U.S.C. Section 185 (hereafter Section 301). (RAB, pp.22-24.) Paratransit is wrong for many reasons.

1. Paratransit waived its preemption claim by not raising it previously.

Paratransit raises LMRA preemption for the first time in its brief on the merits to this Court. Paratransit did not make this argument in the administrative hearing, to the Board, to the trial court, to the Court of Appeal or in its answer to the Petition for Review to this Court. Having failed to raise the argument below, Paratransit has waived it. (*See e.g. In Re Julian R.* (2009) 47 Cal.4th 487, 497 n.3.)

This is doubly true because Paratransit's failure to raise the argument in the administrative proceeding means that it did not exhaust its administrative remedy with respect to the argument and, therefore, the Court lacks jurisdiction to hear it. (*Shelter Creek Dev. Corp. v. City of Oxnard* (1983) 34 Cal.3d 733, 738, fn. 1.)

2. Federal and state courts have concurrent jurisdiction over Section 301 lawsuits.

Paratransit claims LMRA preemption is jurisdictional and, therefore, cannot be waived. (RAB, p.23.) Paratransit is wrong.

There is concurrent state court and federal court jurisdiction over suits under Section 301. (*Charles Dowd Box Co. v. Courtney* (1962) 368 U.S. 502, 507-14.) The reason for this is, while Section

301 grants federal courts jurisdiction over suits for violation of CBAs, it does not limit that jurisdiction to federal courts. (*Id.*)

Paratransit's claim that Section 301 of the LMRA prevents a state court from adjudicating the meaning of a CBA is also wrong. (RAB, pp.22-23.) This Court has squarely held that California courts can interpret CBAs and that in doing so they simply use federal law. (*McCarroll v. Los Angeles County District Council of Carpenters* (1957) 49 Cal.2d 45, 59 [citation omitted].) The United States Supreme Court favorably cited *McCarroll* in holding that state courts may interpret CBAs in accordance with federal labor law, which controls over inconsistent state law. If there is no inconsistency with federal labor law, state law common law principles may be used. (*Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.* (1962) 369 U.S. 95, 102 and n.10; *see also McCarroll, supra*, 49 Cal.2d at p.60 ["Until [federal labor law] is elaborated . . . we assume it does not differ significantly from our own law."].)

Paratransit does not show that federal labor law regarding interpretation of contracts is any different from or inconsistent with California law set out in the AOB, nor does it show any reason why applying federal labor law would give a different result. In fact, federal labor law and California law use the same contract

principles. Federal labor arbitrators consistently state the plain language of the CBA governs. (*See e.g. In Re Barton Brands Ltd.* (2005) 120 LA 1765, 1768; *In Re City Southfield* (2009) 126 LA 1144.) Federal labor arbitrators also use dictionary definitions to determine the meaning of words in a CBA, just as California courts do. (*See e.g. In Re Bay Medical Center* (1995) 104 LA 830, 832.)

Section 301 neither prevents this Court from interpreting the CBA nor does it change the analysis that Paratransit's order violated the plain and ordinary language of the CBA.

3. *Valles v. Ivy Hill* supports Medeiros's right to claim unemployment insurance benefits in state administrative and judicial proceedings.

Paratransit's reliance on *Valles v. Ivy Hill Co.* (9th Cir. 2005) 410 F.3d 1071, 1075 is badly misplaced. Paratransit relies on general language in *Valles* while ignoring the actual holding. The case does not hold that state courts lack jurisdiction over Section 301 claims. In fact, *Valles* supports Medeiros's right to pursue this action in state court.

The question in *Valles* was whether a lawsuit by unionized workers against their employer for adequate meal and rest breaks required by state law was preempted by Section 301. The employer removed the case to federal court, the district court denied the employees' motion to remand to state court and granted summary

judgment for the employer. The Ninth Circuit reversed with instructions to remand the case to state court. The court held that Section 301 preemption does not trump state laws setting minimum labor standards and, therefore, plaintiffs were entitled to litigate their claims in state court. (*Id.* at p.1076 [citing *Humble v. Boeing Co.* (9th Cir. 2002) 305 F.3d 1004, 1007 (citing *Lingle v. Norge Div. of Magic Chef, Inc* (1988) 486 U.S. 399, 408-409; *Livadas v. Bradshaw* (1944) 512 U.S. 107, 122)].)

As in *Valles*, Medeiros asserts a right of employees established and governed by state law, the right to unemployment insurance benefits.

4. Section 301 preemption does not arise as Medeiros did not assert a claim under the CBA; Paratransit raised the CBA as a defense.

Section 301 does not preempt Medeiros's unemployment insurance claim because the CBA was introduced by Paratransit as a defense to his claim. "[I]n order for complete preemption to apply, 'the need to interpret the CBA must inhere in the nature of the plaintiff's claim. If the claim is plainly based on state law, § 301 pre-emption is not mandated simply because the defendant refers to the CBA in mounting a defense." (*Valles, supra,* 410 F.3d at 1076, quoting *Cramer v. Consolidated Freightways* (9th Cir. 2001) 255 F.3d 683, 689, cert. denied.)

In any proceeding, including Section 301 cases, raising a federal issue such as CBA interpretation as a defense to a state law claim does not support preemption. (*Caterpiller, Inc. v. Williams* (1987) 482 U.S. 386, 398-99.) Paratransit cites *Cramer, supra,* 255 F.3d 683, but *Cramer* itself says that the Supreme Court has "held that a defense based on the terms of a CBA is not enough to require preemption." (*Cramer, supra,* 255 F.3d at p.690.)

Medeiros's unemployment insurance claim is clearly based on state law, the California Unemployment Insurance Code. His claim is not based on the CBA nor is this a disguised breach of CBA case. Neither his application for benefits nor his request for a hearing mentioned the CBA. (AR, Exhibits 4-A, 8A-B.) The CBA was raised by Paratransit as a defense—i.e., that under the CBA Medeiros was guilty of insubordination for not signing the memorandum. (CT 00026: 23 – CT 00029: 7, 19-27 [raising the CBA]; *see* AR Exhibit 11A-B; *see also* CT p.00063: 5-9, 14 [introducing CBA Section 54]; *see* AR Exhibits 12A-B; *see also* AR Transcript of Hearing pp.56: 23–57: 1, 14-16 [arguing Medeiros committed misconduct *because* he violated the CBA by not signing memorandum].) Medeiros countered that the CBA does not support Paratransit's defense. That does not give rise to Section 301 preemption.

5. Section 301 does not preempt actions to enforce non-negotiable rights of employees established by state law.

State rules that establish rights and obligations independent of the labor contract are not preempted. (*Allis-Chalmers Corp v. Lueck* (1985) 471 U.S. 202, 211.) "Section 301 has not become a 'mighty oak' that might supply cover to employers from all substantive aspects of state law." (*Valles*, *supra*, 410 F.3d at p.1075 [citations omitted].)

In particular, nonnegotiable state law employee rights are not preempted. " . . . Section 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and we stressed that it is the legal character of the claim, as 'independent' of rights under the collective-bargaining agreement . . . that decides whether a state cause of action may go forward." (*Lividas*, *supra,* 512 U.S. at pp.123-124 [citations omitted].)

Medeiros's right to unemployment insurance benefits is created by state law that is independent of the CBA. The standard for eligibility is set by a state statute, Unemployment Insurance Code Section 1256. Only the California Employment Development Department can determine initial eligibility for unemployment insurance. (Unemp. Ins. Code §§1253, 1326.)

Allis-Chalmers illustrates this distinction. There, a union member filed a tort lawsuit in state court for bad faith handling of an insurance claim. (*Allis-Chalmers*, *supra*, 471 U.S. at p.206.) The claim was for benefits from a fund created by a CBA, administered under standards in the CBA and by an agent appointed under the CBA. (*Id.*) The Supreme Court held the state law tort claim preempted because in adjudicating the claim, the court was required to determine eligibility under a standard created by the CBA. (*Id.* at pp.211-219.) As a result, the claim for benefits under the CBA had to be brought under Section 301.

By contrast, unemployment insurance is created by state law, benefits are paid from a fund held and administered by the state, and claims are determined under state law standards. No CBA plays any part. The state is not bound by any decision of a union grievance procedure and determines unemployment insurance claims independently of union involvement in any particular case. (*Matter of Reed* (1949, designated precedent 1976) P-B-187 at p.4.)

Applying *Allis-Chalmers*, the Montana Supreme Court held that Section 301 did not preempt an unemployment insurance claim. (*Multiple Stimson Employees v. Stimson Lumber Co.* (Mont. 2001) 21 P.3d 613.)

> [T]he present action concerns eligibility for unemployment benefits governed by state unemployment law. There is no question about what the parties agreed to or what legal consequences were intended to flow from a breach of the collective bargaining agreements. As a result, the present matter implicates state rules which establish rights and obligations independent of the labor contract. Therefore, it presents a question of state law and is not subject to Section 301 preemption analysis. (*Id.* at p.617.)

The same is true here.

6. Paratransit, having injected the CBA into the proceeding, may not now claim that it was error for the Board and the courts to consider and interpret the CBA.

"Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal on appeal . . . the doctrine . . . prevents a party from misleading the trial court and then profiting therefrom in the appellate court." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [citation omitted].) This is what Paratransit is attempting to do.

At the administrative hearing, in response to Medeiros's CUIAB appeal, and again in its trial court writ petition, Paratransit introduced the CBA as a basis for its response to Medeiros's unemployment insurance claim, alleging that he had a duty to sign the disciplinary memorandum. (CT 00026: 23—CT 00029: 7, 19-27; CT 00011, ¶ 39.) Now, Paratransit claims the entire unemployment insurance claim is improper because the CBA is involved.

This attempt to argue that Medeiros's claim is preempted based on the CBA it initially introduced in response to the claim is the essence of the invited error doctrine and should not be allowed.

7. This case does not contravene the policy underlying Section 301 preemption.

Federal law governs interpretation of CBAs to serve the policy of uniformity in interpretation of CBAs and a uniform national labor law. (*Local 174, supra*, 369 U.S. at pp.103-104.) That policy is not implicated here. Findings of fact and conclusions of law in California unemployment insurance proceedings cannot be used for any other purpose. (Unemp. Ins. Code §1960; *Pinchon v. Pacific Gas & Electric* (1989) 212 Cal.App.3d 488, 503.) Interpretation of a CBA in an unemployment insurance case cannot

affect interpretation of the CBA in any other proceeding or alter national labor law.

D. Medeiros was not required to exhaust a collective bargaining grievance process.

1. Medeiros was not required to "comply and grieve" Paratransit's unlawful and unreasonable order.

Paratransit claims that Mr. Medeiros should have complied with its order and then filed a grievance. (RAB, pp.17-19.) The argument assumes a fact for which there is no supporting evidence: that the grievance procedure covers refusal to sign a document under CBA Section 54.

Paratransit submitted several sections of the CBA during the administrative hearing but none included the scope of the CBA grievance procedure. (*See* AR Exhibit 11 A-B, CT 00076-77, AR Exhibit 16.) Without that evidence, the CBA grievance procedure is irrelevant to Medeiros's unemployment insurance claim. (*Rabago v. Unemployment Insurance Appeals Bd.* (1978) 84 Cal.App.3d 200, 214 [CBA grievance procedure irrelevant to unemployment insurance claim because no evidence grievance procedure applied to claimant's issue]; *accord Wright v. Universal Maritime Service Corp.* (1998) 525 U.S. 70, 79-80 [CBA requirement to arbitrate a statutory claim must be "clear and unmistakable"].)

Moreover, "comply and grieve" is a labor law concept. Union arbitration proceedings decide good cause discipline, while unemployment insurance is based on the different concept of "misconduct" as that term is understood for unemployment insurance purposes. (*Matter of Reed*, P-B-187 at p.4; *see also Teamsters Local Union No. 273 v. CBX Beckett Aviation* (W.D. Penn 1988) 687 F.Supp. 985, 987; *Patricia v. Delford Industries, Inc.* (S.D.N.Y. 1987) 660 F.Supp. 1429, 1435.) Nothing in the Unemployment Insurance Code requires that a union member comply and grieve as a condition of eligibility for unemployment insurance benefits and Paratransit does not cite any court case imposing such a condition. There is no reason to equate the two separate issues. Doing so violates the duty to liberally construe unemployment insurance eligibility in favor of workers. (*See Amador*, *supra*, 35 Cal.3d at p.683.)

Paratransit claims that not requiring employees to grieve as a condition of unemployment insurance would improperly limit the effectiveness of CBA grievance procedures. (RAB, pp.18-19.) Paratransit ignores the difference between eligibility for unemployment insurance and cause for termination of employment. Standards for unemployment insurance have no bearing on whether

an employee can be fired or on procedural requirements for challenging termination of employment.

In addition, "comply and grieve" is not an absolute requirement in federal labor law. Exceptions include health and safety and demands to engage in criminal acts. (*See e.g. In Re Kilsby Tubesupply Co.* (1981) 76 LA 921, 922.) Other exceptions can exist when the issue does not involve interruption of employee operations or overriding employee rights. (*In Re Sheller Mfg. Corp.* (1960) 34 LA 689, 689.)

In *Kilsby Tubesupply*, an employee was ordered to sign a timecard he believed was incorrect. (*Kilsby, supra,* 76 LA at p.921.) He refused and was disciplined. (*Id.*) A federal labor arbitrator found that because compliance could be an acknowledgement, the employee could challenge the discipline without complying first. (*Id.* at pp.922-23.)

The same is true here. Medeiros could not have signed the disciplinary memo, then taken back his signature on the document in a later proceeding by Paratransit or a third party. (*See* AOB at 23-25.) Requiring him to comply and grieve would have subjected him to the very risk of admitting the allegations of the disciplinary memorandum that the CBA was intended to prevent.

Under these circumstances, where compliance is a singular act that cannot be undone, comply and grieve is not required.[2]

2. Medeiros did not have to exhaust the CBA grievance process to receive Unemployment Insurance benefits.

Paratransit further claims that Medeiros had to comply and grieve before he could receive unemployment insurance benefits because only a labor arbitrator can interpret a CBA. (RAB, pp.29-30.) Paratransit is wrong for several reasons.

Paratransit did not raise this argument below or in its answer to Petition for Review. Paratransit has waived the argument. (*In Re Julian R.*, *supra*, 47 Cal.4th at p. 497 n.3.)

Paratransit does not contend that some exception to the waiver rule allows it to make this new argument for the first time in this Court. Nor could it because exhaustion of a CBA grievance process is an affirmative defense, not a jurisdictional bar. (*Paese v.*

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[2] *Paratransit* relies on *Ludlow* to support its claim that Medeiros should have complied and filed a grievance. (RAB, p.18.) As already noted, there is no evidence in the record that any grievance procedure applied to Medeiros's situation. Furthermore, the facts in *Ludlow* are far different from this case. In *Ludlow*, the employee was asked to dust fire extinguishers, a work related order that could be followed without risk to the employee. (*Ludlow*, *supra*, at p.2.) By contrast, the order to Medeiros did not relate to job duties and his compliance risked making an admission that could not be undone with a successful grievance. To the extent *Ludlow* could be read to hold that a union employee must comply and grieve as a condition of eligibility for unemployment insurance benefits, it should not be followed.

Hartford Life and Acc. Ins. Co. (2nd Cir. 2006) 449 F.3d 435, 444 [citations omitted]; *Outstate Michigan Trowel Trades Health and Welfare Fund v. Alpha Concrete Corp.* (W.D. Mich. 2008) 2008 WL 4960154, *5 [citations omitted].)

Moreover, Paratransit's claim is false. State courts can interpret a CBA, although they must do so using applicable federal common law. (*Teamsters Local 174, supra,* 369 U.S. at p.103.) Paratransit cites *Lividas, supra*, 512 U.S. 107, to attempt to support its claim. Paratransit badly misstates the case. *Lividas* discusses the argument that only arbitrators can interpret CBAs and then expressly rejects it. (*Id.* at p.121.) *Lividas* makes this clear a few paragraphs later: "§ 301 does not disable state courts from interpreting the terms of collective-bargaining agreements in resolving non-pre-empted claims." (*Id.* at p.123 n.17; *accord Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399, 403 n.2 ["We later concluded that state courts have concurrent jurisdiction over § 301 claims. . . . State as well as federal courts must apply federal law in deciding these claims." [citation omitted].)

Paratransit quotes *Republic Steel Corp. v. Maddox* (1965) 370 U.S. 650, 652-53 for the proposition that Medeiros was required to pursue his unemployment insurance claim through the CBA grievance process. (RAB, p.29.) However, there was no CBA

remedy Medeiros could exhaust. Unemployment insurance can be granted only by the Employment Development Department. (Unemp. Ins. Code §§1253, 1326.) Appeals of denials of unemployment insurance can be decided only by the Board. (Unemp. Ins. Code §1951.)

For this reason, unemployment insurance claims are not subject to arbitration. (*Mercurio v. Superior Court* (2002) 96 Cal.App.4th 167, 176.) Decisions by other tribunals, including union arbitrators, have no bearing on unemployment insurance eligibility. (*Matter of Reed* (1949, designated precedent 1976) P-B-187 at pp.4-5; *accord Amador, supra,* 35 Cal.3d at pp.684-85 [determination by local civil service board not binding in unemployment insurance proceeding].)

Furthermore, a worker is not required to file a union grievance when the desired relief cannot be awarded under the grievance procedure. (*Clayton v. International Union, United Auto, Aerospace and Agr. Implement Workers of America* (1981) 451 U.S. 679, 693.) A labor arbitrator cannot grant unemployment insurance benefits. There was no arbitration remedy to exhaust.

And even if an arbitrator were somehow allowed to grant unemployment insurance benefits under California state law, once again, there is no evidence in the record that an unemployment

insurance claim was subject to arbitration under the CBA. A party cannot be required to submit a dispute to a union grievance procedure unless required to do so by the CBA. (*United Steelworkers of America v. Warrior & Gulf Nav. Co.* (1960) 363 U.S. 574, 582.)

The party claiming that an action is covered by an arbitration clause has the burden to prove the arbitration provision. (*Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413; *see also Wright, supra,* 525 U.S. at pp.79-80.) Not having presented the grievance provision of the CBA or any evidence that it covered unemployment insurance claims, Paratransit cannot meet its burden to show that there is an unexhausted grievance procedure.

E. The Court Of Appeal improperly disregarded whether the disciplinary memorandum complied with the CBA.

The Court of Appeal evaded the question of whether Medeiros had a duty to sign under the CBA. Instead, the court speculated whether Medeiros would have signed the disciplinary memorandum had it complied with the CBA, and demanded that he expressly state the order violated the CBA when the order issued.

Paratransit argues the Court of Appeal implicitly addressed whether Medeiros had a duty under the CBA to sign the

memorandum, and denies the court speculated as to whether he would have signed had the memorandum complied with the CBA.

The Court of Appeal majority did not address whether the order complied with the CBA. The majority dismissed the question as a "red herring." (*Paratransit, supra*, 206 Cal.App.4th at p.1327.)[3] The court went on to say there was "no reason to believe [Medeiros] would have signed the document even if it had been in a form more in line with the requirements of the CBA." (*Id.*) With those words, the court *expressly* side-stepped the issue of CBA compliance by speculating about what might have happened had the order complied with the CBA. The majority could not have addressed an issue it affirmatively declined to address.

Paratransit also denies that the Court of Appeal required Medeiros to expressly state that the order to sign the disciplinary memorandum violated the CBA. (RAB, p. 21.) However, the court majority stated: "At no time during the May 2 meeting did [Medeiros] assert he would not sign the document because it failed to comply with the CBA." (*Paratransit, supra,* 206 Cal.App.4th at p.1327.) That is an express requirement to cite the CBA as the

[3] Notably, for purposes of the standard of review, Paratransit says the Court of Appeal found the CBA was a "red herring" and therefore interpretation of the CBA does not require independent review. (RAB, p.9.) Paratransit cannot have it both ways.

reason for violating the employer's order. The Court of Appeal erred in imposing it. "In the context of a workplace dispute, where the participants are likely to be unsophisticated in collective-bargaining matters, a requirement that the employee explicitly refer to the collective bargaining agreement is likely to be nothing more than a trap for the unwary." (*National Labor Relations Board v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 840.)

Paratransit does not attempt to defend the majority opinion requirement that an employee cite the CBA as a reason for refusing an order. Nor does Paratransit dispute that no authority supports imposing such a requirement or that it would be bad public policy to prevent employees from challenging working conditions only because they do not know immediately the terms of CBAs. (AOB, pp.18-19.)

To the extent that some reference to a CBA is needed when an employee refuses to comply with an employer order, all that is required is the complaint be reasonably clear and refer to a perceived violation of the CBA. (AOB, pp.18-19.) As shown in the opening brief, Medeiros's complaint was sufficiently clear and referred to a perceived violation of the CBA. (*Id.*)

In *City Disposal, supra,* 465 U.S. at p.840, the leading case on individual employees rights under a CBA, there was no evidence

that the employee knew he was expressing rights under the CBA, yet he sufficiently invoked the CBA. Additionally, in *In Re Bechtel Power Co.* (1985) 277 NLRB No. 88, 5, the employee's request to speak to a union steward was sufficient to inform the employer that his issue involved the CBA. That is exactly what Medeiros did. (*Paratransit, supra*, 206 Cal.App.4th at p.1323.)

Moreover, the notion that Medeiros needed to invoke the CBA in so many words makes no sense because Paratransit's representatives themselves invoked the CBA by telling him it required him to sign the disciplinary memorandum. (CT 00046:18–00047:1 [hearing testimony that Paratransit told Medeiros he had to sign and telling him specific CBA section that allegedly mandated signing]; *see also* CT 00004 ¶13; 00011 ¶39 [allegations in writ petition that Paratransit's representatives told Medeiros the CBA required him to sign]; *Paratransit, supra*, 206 Cal.App.4th at p.1322 [stating Paratransit representatives told Medeiros CBA required him to sign].) There was no reason for Medeiros to invoke the CBA when Paratransit had already done so.

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II. PROOF OF INJURY TO EMPLOYER IS A PREREQUISITE TO FINDING MISCONDUCT.

A. The employer bears the burden of proving injury or tendency to injure employer's interests.

Paratransit argues that an employer does not have a burden to prove injury to its interests because injury is inherent to the definition of misconduct. (RAB, p.26.) Paratransit misconstrues the law.

First, the governing regulations provide that a finding of misconduct requires injury to the employer's interests. Misconduct exists only if "all" of the elements listed in the regulations are present including that ". . . the breach disregards the employer's interests *and injures or tends to injure the employer's interests.*" (Cal. Code Regs., tit. 22, §1256-30 [emphasis added].) These elements apply where the alleged breach is insubordination. (Cal. Code Regs., tit. 22, § 1256-36(a).)

Second, employers bear the burden of proving misconduct for unemployment insurance purposes. (*Maywood Glass Co. v. Stewart* (1959) 170 Cal.App.2d 719, 725.) Unemployment Insurance Code Section 1256 codifies this burden and provides that individuals are ". . . presumed to have been discharged for reasons other than misconduct . . . ." (Unemp. Ins. Code §1256.) To overcome the presumption, the employer or the department must establish "by a

preponderance of the evidence that the claimant quit without probable cause or was discharged for misconduct in connection with his work." (*Perales v. Department of Human Resources Dev.* (1973) 32 Cal.App.3d 332, 340-41.)

Paratransit ignores Section 1256 and attempts to dismiss *Perales* by arguing it concerned whether an employee voluntarily quit without good cause, not misconduct. (RAB, p.28.) Paratransit also attempts to side-step the elements of misconduct expressly required by the regulations by arguing that the regulations do not address the burden of proof, so the employer does not have the burden of proof. (RAB, pp.36, 38.)

While the regulations do not address the burden of proof for misconduct, Unemployment Insurance Code Section 1256 is unequivocal: employers bear the burden of overcoming the presumption that the discharge was not for misconduct.

Moreover, the *Perales* court did not confine its holding to cases where employees voluntarily quit. (*Perales, supra,* 32 Cal.App.3d at pp.340-41.) Rather, it expressly held the presumption also applies in alleged misconduct cases. (*Id.*)

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B. Injury to an employer's interests may not be inferred in the absence of evidence supporting such an inference.

To date, Paratransit has been unable to identify any interest that was harmed by Medeiros not immediately signing the disciplinary memorandum so that he could seek guidance from the union before he signed. Paratransit attempts to fill that gap by asserting an employer's general interest in obedience to lawful and reasonable orders and arguing that injury is inferred whenever a lawful and reasonable order is disobeyed. (RAB at 28-38.)

The argument is contrary to the regulations. As discussed in the previous section, injury is a separate element of misconduct and remains an element where the alleged breach is insubordination for failure to follow lawful and reasonable orders. (*See* Cal. Code Regs., tit. 22, §§1256-30, 1256-36(a).) A comment to the regulations underscores that harm to an employer's interest is required. "Under paragraph (1)(C) of subdivision (b), the employee does not have to comply with his or her employer's orders if they are unrelated to the employer's business interest." (Cal. Code Regs., tit. 22, §1256-36, comment 3.) The regulations then provide an example: an employee's failure to comply with an order to cease discussions of opening another company was not misconduct

because the conduct did not disrupt the employer's business. (*Id.*, example 3 comments.)

Paratransit argues this example is inapplicable because it references part of the regulation excusing compliance from a lawful and reasonable order that is unrelated to an employer's interest. (RAB, p. 36.) But that is the point of Justice Blease's dissent: the order here did not implicate the employer's interests. (*Paratransit, supra*, 206 Cal.App.4th at pp.1333-34 [dis. opn. of Blease, J.].) Moreover, the comment demonstrates that, if the employer's interests are not at stake, disobedience of even a lawful and reasonable order is not misconduct.

Paratransit's reliance on a generalized interest in obedience is contrary to the Board's repeated precedent benefit decisions. (*See Matter of McCoy* (1976) P-B-183, p.2; *Matter of Thaw* (1977) P-B-362, pp.7-8; *Matter of Santos* (1970) P-B-66, pp.3-5; AOB 29-30.) In *McCoy*, for example, the Board did not analyze whether the employer's general interest in being obeyed was harmed, but evaluated whether the employee's specific actions harmed the employer's interests. (*McCoy, supra*, P-B-183 at p.2.) In *McCoy*, the employee refused to obey the employer's order to cease talking with other employees about organizing a new company. (*Id.*) The Board held that his refusal was not misconduct because there was no

evidence that the employee's specific conduct interfered with the employer's business or that the order was "in any way necessary to protect or preserve its business." (*Id.*)

Paratransit argues *McCoy* is distinguishable because it turned on whether the order was reasonable. (RAB, p.35.) The Board, however, identified two issues in *McCoy*: 1) whether the order was reasonable; and 2) whether the employee was discharged for reasons other than misconduct. (*Id.* at p.2.) The Board reasoned that since there was no harm to the employer's interests, there was no misconduct. (*Id.*) Even assuming the Board conflated the two issues, that does not detract from the holding that the lack of evidence of actual injury to the employer's interests precluded a finding of misconduct.

Paratransit argues *Thaw* and *Santos* do not apply because they involved application of the "Bagley Test" to balance constitutional rights against the employer's interests. (RAB, p.35.) While both included discussions of the Bagley Test, both also evaluated whether the specific act constituting the alleged insubordination harmed the employer's interests such that they constituted misconduct. (*See Thaw, supra* at pp.7-8 *Santos, supra* at pp.3-5.) In *Thaw*, the Board relied upon the lack of evidence demonstrating injury to the employer's business as a result of the employee wearing a beard. In

Santos, the Board relied upon evidence supporting such injury. (*Thaw, supra* at pp.2, 7-8; *Santos, supra* at pp.3-4.) In neither case did the Board do what Paratransit suggests, which is to assume a generalized, nebulous injury from disobeying an employer's order.

Paratransit's reliance on *Ludlow* and *Gant* for the proposition that injury is implied once an order is deemed lawful and reasonable is misplaced. *Ludlow* was adopted by the Board 1976 and *Gant* was decided in 1978. Both were decided before the promulgation of the regulations stating the elements of misconduct, specifically including injury or tendency to injure employer interests, so nothing can be deduced from the Board's failure to address injury to the employer's interests. The regulations were not adopted until 1980. (Cal. Code Regs., tit. 22, § 1256-30, Register 80, No.16 (April 18, 1980).)

Ludlow contains no reference to an employer's interests. (*See Ludlow*, *supra*, P-B-190.) While *Gant* identifies disregard of an employer's interests as an element, it did not analyze that element. (*See Gant, supra,* P-B-400, pp. 3-4.) It may not be supposed that the Board presumed injury as the issue does not appear to have been raised or, if raised, disputed. Nor does it follow that the Board must have inferred harm simply as a result of disobeying the order. (*See id.*)

The evidence in *Gant* could support such an inference because the specific conduct was multiple failures to check whether the wipers and defrosters operated on a truck assembly line. (*See id.* at pp.1-2.) The employer's interest in its trucks being manufactured with working parts is clear. By contrast, Paratransit cannot identify what interest it has that might have been harmed from Medeiros's not agreeing to immediately sign the disciplinary memorandum. The only interest Paratransit can even articulate is having its employees submit to its demands.

The weight of case law holds that injury to an employer's interest must be evaluated, not presumed without evidence. (*Steinberg v. Unemployment Ins. Appeals Bd.* (1978) 87 Cal.App.3d 582; *Thornton v. Department of Human Resources* (1973) 32 Cal.App.3d 180, 186; *see* AOB at pp.28-29.) In *Steinberg*, the court held that the employee was entitled to benefits because there was no evidence that her refusal to comply with an order to communicate with her coworkers "had any deleterious effect on the company as whole." (*Id.* at p.587.) Paratransit argues *Steinberg* is inapposite because the court was evaluating whether the employee voluntarily quit, not whether she was discharged for misconduct. (RAB, p.33.) However, the court was analyzing whether the termination was a constructive quit, which demands the same analysis as

insubordination—i.e. whether the employer's order was reasonable. (*Steinberg, supra*, 87 Cal.App.3d at p.586.) *Steinberg* is instructive because, regardless of whether injury to an employer's interest is evaluated as a separate element or as part of the reasonableness analysis, the point is injury is not presumed without evidence.

Paratransit quotes a snippet from *Steinberg* as an implicit finding of injury to the employer. (RAB, p.34.) Three sentences later, however, the court rejects that inference and finds that no evidence supported such a finding. (*Steinberg, supra*, 87 Cal.App.3d at p.587.) Here, as in *Steinberg*, there is no evidence in the record from which to draw an inference of harm to Paratransit's interests from Medeiros's mere request to talk with a union representative before signing the disciplinary memorandum.

Likewise, in *Thornton*, the court rejected a finding of misconduct because the employer failed to show that the employee's refusal to shave his beard was detrimental to the employer's interests. (*Thornton, supra,* 32 Cal.App.3d at p.186.) Paratransit attempts to minimize *Thornton* by arguing that no constitutional issues respecting wearing a beard exists here, that the court's focus was on whether the order created new and unreasonable burdens, and the court only held that the facts did not permit the inference that the order was reasonable. (RAB, p.34.)

Although *Thornton* analyzed the constitutional right to wear a beard, the court separately evaluated the claim of misconduct. (*Thornton, supra*, 32 Cal.App.3d at pp.185-86.) Also, the fact that the court's focus was on reasonableness is irrelevant. The court held that the employer's evidence did not demonstrate injury; therefore, the order was not reasonable. (*Id.*) Regardless of where the analysis of injury takes place (i.e. as part of the reasonableness discussion or as a separate element), *Thornton* makes clear that injury to an employer's interests must be part of the misconduct analysis. (*See id.*)

Paratransit principally relies on *Rowe v. Hanson* (1974) 41 Cal.App.3d 512 to argue that injury was properly inferred by the Court of Appeal. (RAB at 31-33.) *Rowe* is distinguishable as discussed in AOB at pp. 30-31 and it was decided before the regulations were issued in 1980 making injury to employer's interests an element of misconduct. (*See* Cal. Code Regs., tit. 22, § 1256-30, Register 80, No.16 (April 18, 1980).) *Rowe* is also out of step with *Steinberg* and *Thornton.*

Paratransit points to *Drysdale v. Dept. of Human Resource Development* (1978) 77 Cal.App.3d 345 and *Agnone v. Hansen* (1974) 41 Cal.App.3d 524 to bolster *Rowe*. Neither do. Both relied upon evidence in the record to infer either a disregard of or harm to

an employer's interests. In *Drysdale,* a legal assistant was repeatedly late to work despite several warnings and admonishments. (*Drysdale*, *supra*, 77 Cal.App.3d at p.356.) The court inferred not that her conduct injured the employer, but that her conduct was intentional and that she disregarded the employer's interests. (*Id.*)

In *Agnone,* the court likewise upheld a finding of misconduct where the employee consistently failed to perform satisfactory housekeeping duties despite being admonished on many occasions. (*Agnone*, 41 Cal.App.3d at pp.528-30.) The nursing home she worked in was required by law to maintain a high standard of cleanliness. Viewing the evidence in the light of that legal requirement, the court inferred wrongful intent, disregard of her employer's interests, and knowledge that her continuing conduct would result in harm to such interests. (*Id.*)

Here, inferences such as those drawn in *Drysdale* and *Agnone* are not permissible because there is *no* evidence to support them. Paratransit does not and cannot point to any interest harmed by not immediately signing the disciplinary memorandum but asking to consult with a union representative first. (*See* RAB at 28-38.)

Similarly, there is no evidence to infer that Medeiros "flouted" Paratransit's authority or otherwise exhibited the

"enduring intractability" described in *Rowe*. There were no prior warnings for or repeated instances of insubordination. (CT 00031: 25-00032: 1.) Nor were there any disrespectful or profane interchanges with Paratransit in or out of the presence of customers at the time of the discharging incident. (*See Paratransit*, *supra*, 206 Cal.App.4th at pp.1322-23, 1327.) Medeiros was concerned that signing would be an admission of serious misconduct he disputed and wanted time to consult with the union. (*See id.*) That concern was reasonable.

To the extent that the reasoning in *Rowe* permits an inference of harm under such circumstances or, as Paratransit argues, in every circumstance where the order is deemed reasonable, *Rowe* should be limited to its facts. Otherwise, employers could turn every single instance in which an employee does not follow every mundane order into misconduct despite a lack of evidence of any cognizable harm. Such a finding does not comport with the mandate to construe unemployment law to the benefit of unemployed workers. (*Amador, supra,* 35 Cal.3d at p. 683.)

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III. THE COURT OF APPEAL ERRED IN HOLDING THERE WAS NO GOOD FAITH ERROR IN JUDGMENT.

A. The Court of Appeal applied the wrong standard to evaluate good faith error in judgment.

Paratransit does not dispute that a good faith error in judgment can be based on reasons not directly connected to the employer's order. (RAB, pp.39-40.) Instead, Paratransit avers that the Court of Appeal properly evaluated good faith error in judgment because its standard included ". . . or otherwise reasonably believes he is not required to comply . . . ." (*Id.*, *quoting Paratransit*, *supra*, 206 Cal.App.4th at p.1328.) However, this "or" clause in the Court of Appeal's standard proves Medeiros's argument that the court improperly narrowed the standard for good faith error in judgment. Good faith error in judgment includes reasons personal to the employee that are unrelated to an employer's work related order. (*Amador*, *supra*, 35 Cal.3d at pp.678-79.) The "or" clause in the Court of Appeal's majority decision limits good faith error in judgment to reasons an employee believes he or she is not required to comply with an order.

The next paragraph in the Court of Appeal's decision confirms that its analysis of Medeiros's good faith error in judgment was limited to the terms of the order: "[Medeiros] argues it was

reasonable for him to have been mistaken, if indeed he was, about his obligation to sign the disciplinary memo . . . ." (*Paratransit, supra*, 206 Cal.App.4th at p.1328.) Reasons such as being tired and being confused by discussion of prior unrelated events are not reasons why Medeiros believed he was not obligated to sign. The Court of Appeal's test improperly excludes these kinds of reasons. Limiting the good faith analysis to whether Medeiros reasonably believed he was not required to sign the disciplinary memorandum is an incorrect standard for good faith error in judgment that justifies reversal.

Paratransit claims the Court of Appeal must have used a subjective standard in analyzing Medeiros's good faith because the court deferred to the trial court's findings. (RAB, pp.41-42.) Paratransit ignores Medeiros's showing that the Court of Appeal used an objective standard. (*See* AOB, pp.36-38.) The Court of Appeal's failure to use a subjective standard independently justifies reversal.

Paratransit argues that the Court of Appeal correctly held that the trial court's findings were supported by substantial evidence. (RAB, pp.40-42.) This misses the point. The Court of Appeal analyzed whether the trial court findings were supported by substantial evidence using the wrong standard, an objective standard

that only examined reasons why Medeiros believed he was not required to comply with the order. The trial court also improperly analyzed good faith using an objective standard. (CT 00502-00504.)

The question is the proper legal standard for evaluating good faith error in judgment. That is a question of law. The Court of Appeal could not have used a subjective standard to determine good faith by deferring to the trial court's objective analysis of the issue.

Paratransit also argues that the Court of Appeal was correct in presuming the trial court analyzed the evidence. (RAB, p.41.) Again, this misses the point because it does not address the incorrect standard for good faith used by both the Court of Appeal and the trial court.

B. The proper, subjective standard compels a finding of good faith error in judgment.

Regardless of whether Paratransit's order was lawful and reasonable or whether Paratransit met its burden to demonstrate injury, the Court can and should independently hold that Medeiros's decision not to sign the disciplinary notice without first consulting a union representative was at most a good faith error in judgment under the subjective standard in *Amador*. Where the essential facts are undisputed, the Court may find good faith as a matter of law. (*Amador*, *supra*, 35 Cal.3d at pp.685-686.)

> This court's duty 'to construe the code liberally to benefit the unemployed' precludes the adoption of a draconian rule that would require an employee who reasonably and in good faith fears harm to herself or others to sacrifice her right to unemployment benefits because she acted on that concern. (*Id.* at p.683 [citations omitted].)

The Court further explained that the reasonableness of an employee's act must be judged "from his standpoint in light of the circumstances facing him and the knowledge possessed by him at the time." (*Amador, supra,* 35 Cal.3d at p.683 n.9.)

It is undisputed that Medeiros was sincerely afraid that signing the disciplinary notice was an admission and wanted to speak with a union representative.[4] (*See Paratransit, supra,* 206 Cal.App.4th at pp. 1323, 1327; *see also* CT 472.) As shown in the AOB, that fear was reasonable.[5] (AOB, p.23-24.) Both the Court of Appeal majority and trial court assumed without authority that

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[4] The Court of Appeal misconstrued Medeiros's argument on this point by stating there was no evidence that Medeiros did not sign the memorandum because of the absence of specific language on the notice. (*Paratransit, supra,* 206 Cal.App.4th at p.1329.) Medeiros does *not* argue that he refused to sign the notice because he knew it did not have the specific language required by the CBA. Rather, Medeiros did not believe the language on the notice protected him. Medeiros has consistently argued, and the trial court found and the Court of Appeal agreed, that he believed that by signing he was admitting the truth of the allegations.

[5] Paratransit does not answer this argument.

signing the faulty disciplinary notice did not pose a risk of admission.

More problematic is that both also judged only whether Medeiros's fear was correct and/or objectively reasonable. *Amador* rejected that test. (*Amador*, *supra*, 35 Cal.3d at p.683 n.9.) The Court cited *Rabago, supra,* 84 Cal.App.3d 200 with approval, which held that a "reasonable, good faith, and honest fear of harm" to oneself was sufficient justification for an employee's actions. (*See id.* at pp.681-82.) The Court noted that the only evidence in *Rabago* was his subjective fear of lead poisoning; no medical evidence supported his fear that he had lead poisoning; and, in fact, there was no evidence the employee failed any of the tests regularly administered by the employer to detect lead poisoning. (*See id.*) Nevertheless, the court found good faith based on the employee's subjective fear of harm. (*See id.*)

Here, even if Medeiros was ultimately incorrect that signing would be an admission, his belief was honest and based on the knowledge he had at the time. That knowledge, according to his undisputed testimony, included an understanding from other employees that the union had previously refused to assist those who had signed disciplinary memoranda. (*See* CT 473.) In fact, the fear

was so genuine, he risked termination by refusing to sign. (*See Paratransit, supra*, 206 Cal.4th at p.1323.)

Likewise, even if Medeiros was wrong in his belief that he was entitled to speak with a union representative before signing the disciplinary memorandum, this was at most a good faith error in judgment. The *Weingarten* doctrine is complicated, and the card about *Weingarten* rights provided to Medeiros by his union is ambiguous as applied to the situation here. (*See* CT 00075.) The evidence is undisputed that Medeiros asked to consult with a union representative, and no evidence was presented to refute Medeiros's claim that he genuinely believed he was entitled to consult with his union. (*See Paratransit, supra*, 206 Cal.App.4th at pp. 1322-1323.)

Medeiros's decision not to sign the disciplinary memorandum then and there but to consult with a union representative before signing should be deemed by this Court to be at most a good faith error in judgment.

CONCLUSION

Medeiros's refusal to immediately sign the disciplinary memorandum was not misconduct within the meaning of unemployment insurance law. He had no duty sign the memorandum under the clear and unambiguous terms of the CBA

and Paratransit's demand that he sign it on penalty of termination violated the CBA. Paratransit's attempts to use the LMRA to evade the CBA are contrary to established law.

Moreover, Paratransit can point to no evidence in the record that establishes that not immediately signing the memorandum harmed Paratransit's interests in any way. Harm is a required element of misconduct. It was error for the Court of Appeal to uphold a finding of misconduct without it.

Finally, the Court of Appeal used the wrong standard to evaluate good faith error in judgment and under the correct subjective standard, Medeiros's actions were a good faith error in judgment. For each of these independent reasons, this Court should reverse.

Dated: May 17, 2013

Respectfully submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA

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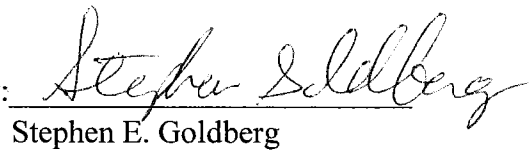
CERTIFICATION

I certify, pursuant to California Rule of Court 8.204(c)(1) that the attached APPELLANT'S REPLY BRIEF contains 11,128 words, as measured by the word count of the computer program used to prepare this brief.

Dated: May 17, 2013

Respectfully submitted,

LEGAL SERVICES OF NORTHERN CALIFORNIA

By: 

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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 old and not a party to the within action. My business address is 515 12th Street, Sacramento California 95814.

On May 17, 2013, I served the within Appellant's Reply Brief in *Paratransit, Inc. v. Unemployment Insurance Appeals Board (Craig Medeiros),* California Supreme Court Case Number S204221 [Third Appellate Dist. Ct. of Appeal Case No. C063863; Sacramento County Sup. Ct. Case No. 34-2009-80000249-CU-Wm-GDS] by placing a true copy enclosed in a sealed envelope, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 17th day of May 2013, at Sacramento California

Alexa C. Garza