

provide a more generous minimum wage rate than both state and federal law, the higher local minimum wage rate governs. It's also important to note that increases in the minimum wage can affect other wage laws, such as by increasing the minimum salary that must be paid to exempt employees.

Bottom line

Following the president's lead, California is currently focused on improving the pay conditions for the state's low-wage workers. In addition to the minimum wage increases scheduled to take effect in July 2014, California employers should keep a close eye on pending legislation that could further raise the applicable minimum wage in the coming years.

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WHISTLEBLOWERS

Reporting old news: Tardy whistleblowers still may get protection

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In the late 1990s, a deputy with the Los Angeles County Sheriff's Department may have been embroiled in the methamphetamine trade and involved in the murder and cover-up of a fellow deputy who happened upon a hidden meth lab during a long-distance run. Or the allegedly corrupt deputy may have been the victim of a false report by an overzealous colleague who promoted a sensational theory of which the department was already aware and had since discredited.

Regardless of where the truth lay, one thing was certain: The county was saddled with a \$4.5 million jury verdict for unlawfully terminating the deputy who made the report. In a recent unpublished decision, the California Court of Appeal made clear that reporting old news still could constitute protected whistleblowing.

A suspicious disappearance

In 1998, Jonathan Aujay, a deputy who was also an ultramarathon runner, went missing while off-duty during a long-distance run through the Devil's Punchbowl, a remote county park abutting the San Gabriel Mountains. The initial investigation determined that he committed suicide or simply disappeared, but an unnamed deputy later provided information suggesting that he had been murdered and that Richard Engels, another deputy, was involved.

Alerted to this more sinister explanation for Aujay's disappearance, the department asked Deputy Sheriff Darren Hager to speak to one of his informants about "dirty deputies" within the department. Hager's informant told him that Engels was involved in an illicit drug trade and in Aujay's disappearance.

Four months after the unnamed deputy first alerted the department regarding Engels, Hager conveyed similar findings to his superiors along with more general information about a large methamphetamine organization in the Antelope Valley. Based on that report, Hager was appointed as the department's liaison to a recently formed U.S. Drug Enforcement Agency (DEA) task force to investigate the meth organization, but he was specifically ordered not to investigate Aujay's disappearance.

An unauthorized investigation

The DEA task force was largely successful in combating the meth trade and produced hundreds of arrests throughout the Antelope Valley. While serving on the task force, Hager sought further information about Aujay's disappearance from informants who were often wiretapped. He was informed that Aujay was killed because he discovered a meth lab while out on a long-distance run, and Engels was actually in the meth lab at the time. Hager also received information linking Engels to a well-known meth dealer.

Hager conveyed information about Aujay's disappearance and Engels's alleged involvement in a report to command staff. His superior also submitted a memo alleging that the homicide bureau was failing to adequately investigate Aujay's possible murder.

The department's command staff assigned an investigator to look into Hager's claims. The investigator reinterviewed many of the people mentioned in Hager's report and concluded that the accusations against Engels were largely unfounded. The department then initiated an internal affairs (IA) investigation of Hager, which concluded that he had conducted an unauthorized personnel investigation and made false statements to his superiors. Specifically, the IA investigation determined that Hager misrepresented the contents of wiretapped conversations to support his theory that Engels was involved in a meth organization and in Aujay's murder.

Whistleblower lawsuit and appeal

After undergoing the requisite disciplinary steps, the department fired Hager for conducting an unauthorized investigation and making false statements. He was granted disability retirement shortly thereafter because of on-duty injuries he suffered in an unrelated incident. Hager then sued for unlawful whistleblower retaliation, alleging that he was discharged for reporting—both before and during his time with the DEA task force—potential misconduct by Engels.

The jury awarded Hager a \$4.5 million verdict, \$2 million of which was for back pay and future lost income, but it didn't grant attorneys' fees. Both parties appealed.

The county argued, among its numerous other challenges to the verdict, that Hager's initial report about Engels wasn't truly whistleblowing because the department was already aware of the allegation from another deputy. Hager challenged the denial of attorneys' fees.

The court of appeal upheld the verdict and ruled that employees who disclose violations that were previously disclosed by another employee are still entitled to protection from whistleblower retaliation under Labor Code Section 1102.5. The court refused to adopt a "first report" rule that protects only the first employee to report violations because such a rule would actually discourage whistleblowers for fear that someone else had already done so. The court distinguished its ruling from existing case law regarding reporting publicly known and other well-known information, which doesn't constitute whistleblowing. The court also left intact the rule that public employees are protected from whistleblower retaliation even if they report wrongdoing to the very person engaged in the wrongdoing.

Although the court upheld the verdict, it struck down the \$2 million in damages for back pay and future income because the award was speculative given Hager's current disability, reducing the county's liability to \$2.5 million. The court also considered whether the county could cite to Hager's other on-duty and off-duty misconduct as nonretaliatory reasons for termination, which would normally be excluded under the Public Safety Officers Procedural Bill of Rights Act (POBRA). The court ruled that such evidence was properly excluded on other grounds and declined to decide the larger question of whether POBRA applies to whistleblower retaliation actions under Section 1102.5. Finally, the court upheld the denial of Hager's attorneys' fees because he didn't file his lawsuit primarily for the public interest under POBRA. *Hager v. County of Los Angeles* (California Court of Appeal, 2nd District, 4/11/14).

Bottom line

While this is an unpublished case and therefore not binding law, it serves to reinforce certain prohibitions against whistleblower retaliation and indicates how California courts may rule in the future on similar issues. You should be aware that when reports of the same misconduct are received from multiple employees, even if some of the reports come months later, all of them may constitute whistleblowing. This is currently the rule under the federal Whistleblower Protection Enhancement Act of 2012, and California courts may very well follow suit in published decisions.

Of course, the other requirements for protected whistleblowing still apply: Disclosures of publicly known violations don't count, and you may still take actions that are clearly unrelated to the disclosure. Many races are often given to the swift, but according to the California Court of Appeal, whistleblowing isn't one of them.



UNION ACTIVITY

Unions praise college football ruling. The United Steelworkers (USW) and the AFL-CIO issued statements of support shortly after a ruling from a National Labor Relations Board (NLRB) regional director saying that scholarship football players at Northwestern University meet the definition of "employee" and are therefore eligible to form a union. "This ruling is a tremendous victory, not just for the athletes at Northwestern, but ultimately for all college athletes, many of whom generate tens of millions of dollars each year for their institutions, yet still are in constant danger of being out on the street with one accident or injury," USW International President Leo W. Gerard said after the March 26 ruling. AFL-CIO President Richard Trumka called the decision "great news" and said it "affirms the basic principle that people who work hard deserve fair treatment." Northwestern University announced it would appeal the ruling, which applies only to private universities since the National Labor Relations Act (NLRA) doesn't cover public universities.

VW workers file suit over UAW challenge to union election. The National Right to Work Foundation is backing a lawsuit filed by five employees at Volkswagen's (VW) Chattanooga, Tennessee, facility. The suit is aimed at blocking what the foundation calls "collusion between the company and the United Auto Workers (UAW)" should the NLRB order a new unionization election at the plant. After the union came up short in a February vote, UAW officials filed objections with the NLRB seeking to overturn the election results. A statement from the foundation said its suit relies on precedent upheld by a federal appeals court that a casino company's assistance to union officials during a card-check campaign could constitute "thing[s] of value" under the Labor Management Relations Act (LMRA). Under that law, employers are prohibited from handing over "any money or other thing of value" to union officials.

Union renews call for armed TSA workers. The American Federation of Government Employees (AFGE) issued a statement in March in response to the Transportation Security Administration's (TSA) review of the November 1 shooting death of a TSA officer at Los Angeles International Airport (LAX). "Ever since Transportation Security Officer Gerardo Hernandez was killed while on duty at LAX last November, AFGE has advocated that TSA create an armed uniformed law enforcement unit within the agency to provide the best possible security for our Transportation Security Officers at the airport checkpoints," AFGE President J. David Cox Sr. said, adding that the TSA's report "justifies our call for armed law enforcement officers at security checkpoints." ❖