



Metropolitan Cases

Central Basin Municipal Water District v. Metropolitan (Los Angeles Superior Court)

Los Angeles Superior Court Judge James C. Chalfant ordered this litigation transferred to the San Francisco Superior Court on June 24, 2008. Under California Code of Civil Procedure section 394 an action between agencies must be transferred to a the Superior Court of a neutral county or assigned to a judge from a neutral county on the motion of either party. Central Basin Municipal Water District filed such a motion, requesting that the action be transferred to the San Francisco Court.

Juli Smith v. Metropolitan, et al. (U.S. District Court, Central District of California)

On March 27, 2008, former Metropolitan employee Juli Smith, who was released during her probationary period, filed a complaint in Los Angeles County Superior Court against Metropolitan and five Metropolitan employees. Plaintiff alleged three causes of action against all defendants: violation of Labor Code Section 6310 (a "whistleblower" protection statute), wrongful termination in violation of public policy, and intentional infliction of emotional distress. Plaintiff then amended her complaint to add a fourth cause of action for harassment and/or discrimination based on gender, against Metropolitan and three of the individual defendants. To date, plaintiff has served two of the individual defendants with the summons and amended complaint. These defendants removed the case to the United States District Court, Central District, and on June 5, 2008 filed

a motion to dismiss and a motion to strike certain claims. Plaintiff did not file oppositions to the motions. The hearing on the motions and the first Scheduling Conference, at which the Court will likely set a trial date, are scheduled for July 28, 2008. The other defendants will file their responsive pleading within 30 days of service of the summons and amended complaint. (See General Counsel's May 2008 Activity Report)

Gregg Whittlesey v. Metropolitan (Los Angeles County Superior Court)

On December 7, 2007, Metropolitan was served with a summons and complaint for damages by Gregg Whittlesey, a former Metropolitan employee who was released during his probationary period. Plaintiff alleges three causes of action: wrongful termination in violation of public policy, defamation, and intentional infliction of emotional distress. Metropolitan filed its answer, containing a general denial and affirmative defenses, on January 4, 2008. The parties are engaged in discovery. Both parties have responded to requests for production of documents, Metropolitan has responded to interrogatories, and Metropolitan has taken two days of plaintiff's deposition. The parties appeared at the first Case Management Conference in April 2008, at which the Court set a jury trial to begin on December 3, 2008 and ordered the parties to participate in a mediation. The mediation is scheduled for July 30, 2008. (See General Counsel's May 2008 Activity Report)

Cases to Watch

EPA Issues Final Water Transfer Rule

On June 9, 2008 the U.S. Environmental Protection Agency (EPA) issued its final water transfer rule. Consistent with the proposed rule issued in June 2006, the final rule exempts transfers from one water body to another from

Clean Water Act permitting requirements as long as the transferred water is not subjected to any intervening industrial, municipal, or commercial use that would result in introduction of a pollutant to the transferred water.

The Clean Water Act prohibits the discharge of a pollutant into waters of the United States without a



National Pollutant Discharge Elimination System (NPDES) permit. Whether an NPDES permit is needed where water is moved through aqueducts, tunnels, channels, and natural streams for public water supply purposes has been an issue in many court cases in recent years. In 2004, the Supreme Court vacated a U.S. Court of Appeals decision in *South Florida Water Management District v. Miccosukee Tribe* that held transfers between two water bodies required a permit where water from one source added a pollutant to the second water source that was not present before. Ultimately, the Supreme Court sent the case back for a further determination whether the two waters were meaningfully distinct.

In issuing the rule, EPA takes the position that, when passing the Clean Water Act, Congress intended to leave primary oversight of water quality issues associated with water transfers to the states. According to EPA, individual states remain able, under the final rule, to regulate water transfers within their boundaries.

***Lexin v. The Superior Court of San Diego County* (California Supreme Court)**

Last October, we reported on a court of appeal case having the potential to fundamentally change the collective bargaining process for public agencies in California. That case, *Lexin v. Superior Court*, has been vacated because it will be reviewed by the California Supreme Court.

The case arose out of a decision by the San Diego City Employees' Retirement System (SDCERS) board of administration to approve an increase in pension benefits for city employees and, at the same time, allow the pension fund to be underfunded. The San Diego County district attorney brought a criminal proceeding against certain members of the board, alleging a violation of Government Code section 1090.

Section 1090 prohibits a public official or employee from participating in a decision in which the official or employee has a financial interest. In *Lexin*, the district attorney argued the board

members who are public employees have an indirect financial interest in the decision to increase the pension benefits because they are members of the bargaining units that would be affected by the change to the benefits. The board members argued in response that their decision fell within the salary exception to section 1090, which provides that participating in a decision affecting the official's or employee's own salary does not constitute a 1090 violation. The 4th District Court of Appeal did agree that pension benefits are part of an employee's salary for purposes of the salary exception. The Court noted, however, that the salary exception contained its own exception where the decision "directly involves the department of the government entity that employs the officer or employee." In a case of first impression, the Court found that a salary or benefit increase that goes to the entire work force still directly involves the officer's or the employee's department because that department would get the enhancement along with everyone else.

Prior to *Lexin*, the universal interpretation has been that "directly" means solely or exclusively. So, unless the benefit was going exclusively to elected officials or management, they could participate in contract negotiations with employee organizations. This has allowed elected officials and management to negotiate labor agreements with bargaining units even though they receive some of the same benefits. For example, typically pension plans require all general employees, including management, to belong to the same plan.

The League of California Cities, the California State Association of Counties, the Association of California Water Agencies, and the California Special Districts Association all supported the request to the California Supreme Court to grant review of this decision. Review was granted on November 28. This grant vacates the lower court's decision, allowing the California Supreme Court to make its own ruling in the case. The case is still being briefed and it could take several months before the Supreme Court rules.

Items of Interest

Finances

On July 1, 2008, Metropolitan closed the sale of \$133,430,000 Water Revenue Refunding Bonds, 2008 Series B. This transaction is anticipated to save about \$620,000 per year in debt service costs through maturity of the bonds in 2022. Legal Department staff prepared Appendix A to the Official Statement



and worked with outside co-bond counsel and attorneys for the underwriters on the bond documents throughout May and June to issue the refunding bonds. The updates to Appendix A were presented to the Board on May 13, 2008. The bond disclosure was supplemented to include descriptions of Metropolitan's Water Supply Alert resolution and the Governor's emergency declaration.

EDiscovery

The Legal Department continues to address issues arising out of changes in the Federal Rules of Civil Procedure, and upcoming changes in California Code of Civil Procedure, regarding discovery of electronically stored information. This relatively new area of the law is generally referred to as "ediscovery."

Since last summer, Legal has met regularly with representatives of IT and Records Management to craft policies and procedures that will ensure that Metropolitan is not only compliant with the new rules, but that compliance is as cost-effective as possible and that Metropolitan is prepared for future litigation that may involve a substantial ediscovery component. Legal is also a core participant in the Ediscovery Project that is headed by a project manager from IT. The goal of this project is to acquire software that can reduce the time and expense of ediscovery while enhancing the Legal Department's ability to accurately analyze electronically stored information before it is produced in litigation.

When the Ediscovery Project is completed, Legal will assist in redrafting appropriate operating policies to accommodate changes in procedures necessary for ediscovery compliance.

Lastly, a staff attorney is a member of the Enterprise Content Management Core Team. This team, made of members from IT, Records Management and the Legal Department, is responsible for implementing a system to manage all of Metropolitan data across the entire enterprise. Systemwide data management is a necessary prerequisite to ediscovery best practices.

Student Assistance

The Legal Department expanded its use of law students and other college students interested in legal careers in order to assist with some of the duties associated with litigation. In addition to its long-standing program of hiring one or two students from local law schools as law clerks, the department is using interns to supplement its workforce. These students are either working for school credit or for the experience of working in a law department and are proving to be quite helpful in assisting with basic research and trial preparation duties.

Legal Tech Convention

Staff members attended the LegalTech event at the Los Angeles Convention Center. This is a major technology event for the legal profession and showcases the latest advances in legal technology in the areas of ediscovery, document management, case management, on-line research, and others.