EXHIBIT 6

Dyna-Med, Inc. v. Fair Employment & Housing Com.
Supreme Court of California. | November 2, 1987 | 43 Cal.3d 1379 | 743 P.2d 1323

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Document Details

KeyCite:	**KeyCite Yellow Flag - Negative Treatment** Superseded by Statute as Stated in Flanagan v. Superior Court (Sid's Barber and Style Salon), Cal.App. 1 Dist., September 20, 1993
Standard Citation:	Dyna-Med, Inc. v. Fair Employment & Hous. Com., 43 Cal. 3d 1379, 743 P.2d 1323 (1987)
Parallel Citations:	743 P.2d 1323, 241 Cal.Rptr. 67, 46 Fair Empl.Prac.Cas. (BNA) 1143, 44 Empl. Prac. Dec. P 37,503

Search Details

Jurisdiction:	California

Delivery Details

Date:	June 17, 2015 at 2:17 PM
Delivered By:	John Jensen
Client ID:	REGULATION CHALLENGE
Status Icons:	

Outline

West Headnotes
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Opinion
Dissenting Opinion
Parallel Citations

43 Cal.3d 1379
Supreme Court of California.

DYNA–MED, INC., Plaintiff and Appellant,
v.
FAIR EMPLOYMENT AND HOUSING COMMISSION, Defendant and Respondent.

L.A. 32145. | Nov. 2, 1987.

Fair Employment and Housing Commission imposed punitive damages against employer found to have retaliated against employee for filing employment discrimination complaint under Fair Employment Practices Act. The Superior Court, San Diego County, Sheridan Reed, J., denied employer's petition for writ of mandate, and employer appealed. The Court of Appeal, Work, J., 220 Cal.Rptr. 158, affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court, Panelli, J., held that California Fair Employment and Housing Act did not authorize Fair Employment and Housing Commission to impose punitive damages against employer found to have retaliated against employee for filing employment discrimination complaint.

Reversed with directions.

Broussard, J., dissented and filed opinion.

West Headnotes (2)

[1] **Civil Rights**
Hearing, Determination, and Relief; Costs and Fees

78Civil Rights
78VState and Local Remedies
78k1705State or Local Administrative Agencies and Proceedings
78k1711Hearing, Determination, and Relief; Costs and Fees
(Formerly 232Ak26.5 Labor Relations)

California Fair Employment and Housing Act did not authorize Fair Employment and Housing Commission to impose punitive damages against employer found to have retaliated against employee for filing employment discrimination complaint; Commission was limited to corrective, nonpunitive remedies. West's Ann.Cal.Gov.Code § 12970(a).

83 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Statutory Basis and Limitation

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A)In General
15Ak303Powers in General
15Ak305Statutory Basis and Limitation

Where legislature simultaneously empowers one agency to award damages and declines similarly to empower another, there is strong inference of legislative intent to withhold authority from nonempowered agency.

400 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

PANELLI, Justice.

[1] In *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 185 Cal.Rptr. 270, 649 P.2d 912 (hereafter *Commodore Home*), we held that a court may award punitive damages in a civil suit for job discrimination pursuant to the California Fair Employment and Housing Act (FEHA or Act)

(Gov.Code, § 12900 et seq.).[1] The issue in the present case is whether the FEHA authorizes the Fair Employment and Housing Commission (Commission or the commission) to impose punitive damages, a question left unresolved in ***68 *Commodore Home.* (Id. at p. 220, 185 Cal.Rptr. 270, 649 P.2d 912.)[2] As will appear, we conclude that the FEHA does not authorize the commission to award punitive damages.

I. BACKGROUND

The California Fair Employment Practice Act (FEPA) was enacted in 1959 (former Lab.Code, § 1410 et seq.; see Stats.1959, ch. 121, § 1, pp. 1999–2005) and recodified in 1980 as part of the FEHA (Stats.1980, ch. 992, § 4, p. 3140 et seq.). "The law establishes that freedom from job discrimination on specified grounds, ... is a civil right. (§ 12921.) It declares that such discrimination is against public policy (§ 12920) and an unlawful employment practice (§ 12940). [Fn. omitted.]" (*Commodore Home,* supra, 32 Cal.3d at p. 213, 185 Cal.Rptr. 270, 649 P.2d 912.) The statute creates two administrative bodies: the *1384 Department of Fair Employment and Housing (the department) (§ 12901), whose function is to investigate, conciliate, and seek redress of claimed discrimination (§ 12930), and the commission, which performs adjudicatory and rulemaking functions (§ 12935; see also § 12903). An aggrieved person may file a complaint with the department (§ 12960), which must promptly investigate (§ 12963). If the department deems a claim valid it seeks to resolve the matter—in confidence—by conference, conciliation, and persuasion. (§ 12963.7.) If that fails or seems inappropriate, the department may issue an accusation to be heard by the commission. (§§ 12965, subd. (a), 12969.) The department acts as prosecutor on the accusation and argues the complainant's case before the commission. (*State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 428, 217 Cal.Rptr. 16, 703 P.2d 354; *Commodore* **1325 *Home,* supra, 32 Cal.3d at p. 213, 185 Cal.Rptr. 270, 649 P.2d 912.)

If an accusation is not issued within 150 days after the filing of the complaint or if the department earlier determines not to prosecute the case and the matter is not otherwise resolved, the department must give the complainant a "right to sue" letter. The complainant may then bring a civil suit in superior court. (§ 12965, subd. (b); see *Commodore Home,* supra, 32 Cal.3d at pp. 213–214, 185 Cal.Rptr. 270, 649 P.2d 912.)

In the instant case Linda Olander initially filed a complaint with the department alleging that Dyna–Med, Inc. (Dyna–Med) discriminated against her with regard to wages and promotional opportunities on the basis of sex in violation of the FEPA. The complaint was resolved by means of a written settlement agreement pursuant to which Dyna–Med agreed, inter alia, not to engage in retaliatory action against Olander for filing the complaint.[3] Approximately five hours after executing the agreement, Dyna-Med fired Olander. Olander filed a new complaint, alleging that she was fired in retaliation for her original complaint. Following a hearing, the commission issued its decision ordering Dyna–Med to pay Olander her lost wages, plus $7,500 in punitive damages.[4] The superior ***69** court denied Dyna–Med's *1385 petition for a writ of mandate. The Court of Appeal affirmed. We granted review.

The sole issue before us is whether the FEHA grants the commission authority to award punitive damages. Resolution of this issue depends on the meaning of section 12970, subdivision (a), which sets forth the scope of relief available from the commission. That section provides: "If the commission finds that a respondent has engaged in any unlawful practice under this part, it shall state its findings of fact and determination and shall issue ... an order requiring such respondent to cease and desist from such unlawful practice and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance."

Before addressing the parties' arguments we state briefly the basis for the Court of Appeal's determination that the commission is authorized to award punitive damages.

"It is undisputed," the Court of Appeal stated, "an administrative agency's power to award such damages must arise from express authorization. Here, the Legislature delegated broad authority to the Commission to fashion appropriate remedies for unlawful employment practices in section 12970, subdivision (a): [¶] 'If the commission finds that a respondent has engaged in any unlawful practice under this part, it ... shall issue and cause to be served on the parties an order requiring such respondent ... to take such action, *including,* **1326 *but not limited to,* hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, *as, in the judgment of the commission,* will effectuate the purposes of this part, and including a requirement for report of the manner of compliance.' ... [¶] Attempting to

harmonize this specific provision in context of the entire statutory framework, we find in section 12920 the underlying purpose of the act is to provide effective remedies to eliminate discriminatory employment practices. Consequently, considering the legislative mandate to liberally construe the act to further these purposes (§ 12993), we conclude it has statutorily authorized the Commission to impose punitive damages where ***1386** necessary to effectively remedy and eliminate unlawful FEHA employment practices." (Emphasis in original.)

In the Court of Appeal's judgment, the facts of the instant case "prove ordinary restitutionary remedies are often ineffective in eliminating discriminatory practices."[5] The court thus determined that "in light of the limited remedial effect of [the] permissible compensatory remedies, the award of punitive damages may be the only method of fulfilling the purposes of the act, including encouraging plaintiffs to seek relief by increasing their potential recovery...."

II. DISCUSSION

Petitioner Dyna–Med and its amici[6] argue that although the Court of Appeal *****70** correctly recognized that the statutory language and legislative history of section 12970, subdivision (a) are determinative of the issue before us, the court misread the statute and misapplied common principles of statutory construction in concluding that the Legislature has authorized the commission to award punitive damages.

Respondent Commission and its amici[7] maintain that the FEHA is unambiguous in authorizing broad relief limited only by the judgment of the commission as to what will effectuate the purposes of the Act, and that the commission has properly determined that the award of exemplary damages in appropriate cases is necessary to deter deliberate discrimination.

A. *Statutory Language*

Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary ***1387** import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844, 157 Cal.Rptr. 676, 598 P.2d 836; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, 110 Cal.Rptr. 144, 514 P.2d 1224, and cases cited; see also ****1327** *Brown v. Superior Court* (1984) 37 Cal.3d 477, 484–485, 208 Cal.Rptr. 724, 691 P.2d 272.) Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688, 104 Cal.Rptr. 110.) Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. (*California Mfrs. Assn.*, supra, 24 Cal.3d at p. 844, 157 Cal.Rptr. 676, 598 P.2d 836; see also *Steilberg v. Lackner* (1977) 69 Cal.App.3d 780, 785, 138 Cal.Rptr. 378.) A statute should be construed whenever possible so as to preserve its constitutionality. (See *Department of Corrections v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 197, 207, 152 Cal.Rptr. 345, 589 P.2d 853; *County of Los Angeles v. Riley* (1936) 6 Cal.2d 625, 628–629, 59 P.2d 139; *County of Los Angeles v. Legg* (1936) 5 Cal.2d 349, 353, 55 P.2d 206.)

We consider, therefore, the statutory language in the context of the legislative purpose. The Legislature has declared that the purpose of the FEHA is to provide effective remedies which will eliminate discriminatory practices. (§ 12920.) Webster's Dictionary defines a "remedy" in part as "something that corrects or counteracts an evil: corrective, counteractive, reparation.... [T]he legal means to recover a right or to prevent or obtain redress for a wrong...." (Webster's New Internat. Dict. (3d ed. 1961) p. 1920, col. 1.) Here the statutorily authorized remedies—hiring, reinstatement, upgrading with or without back pay, restoration to membership in a respondent labor organization—are exclusively corrective and equitable in kind. They relate to matters which serve to make the aggrieved employee whole in the context of the employment.

Punitive damages, by contrast, are neither equitable nor corrective; punitive damages serve but one purpose—to punish and through punishment, to deter. "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme *****71** conduct." (*Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 266–267, 101 S.Ct. 2748, 2759, 69 L.Ed.2d 616; see

*1388 *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13, 148 Cal.Rptr. 389, 582 P.2d 980.)

The general rule is that "[w]here the enabling statute is essentially remedial, and does not carry a penal program declaring certain practices to be crimes or provide penalties or fines in vindication of public rights, an agency does not have discretion to devise punitive measures such as the prescription of penalties or fines. The statutory power to command affirmative action is remedial, not punitive." (Modjeska, Administrative Law Practice and Procedure (1982) Sanctions and Remedies, § 5.9, pp. 170–171, fns. omitted; see *Edison Co. v. Labor Board* (1938) 305 U.S. 197, 235–236, 59 S.Ct. 206, 219, 83 L.Ed. 126; see also *Youst v. Longo* (1987) 43 Cal.3d 64, 82–83, 233 Cal.Rptr. 294, 729 P.2d 728 [where regulatory scheme provides for one kind of relief and is silent on another, it should be construed to exclude the latter].)

Commission acknowledges that punitive damages are different in kind from the enumerated remedies, but argues that in certain cases, as here, where there was "intentional egregious" discrimination and the make-whole remedies are inappropriate,[8] the imposition of exemplary damages is necessary as a deterrent to effectuate the purpose of the Act to eliminate employment discrimination. Citing the statutory directive that the provisions of the Act shall be liberally construed (§ 12993), Commission argues that the language empowering it to take such action "including, but not limited to," the specified actions, is sufficiently broad to authorize it to award punitive damages. By regulation since repealed and in its precedential decisions, the commission has itself so interpreted the statute.[9]

**1328 The contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, although not controlling, is entitled to great weight. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245, 149 Cal.Rptr. 239, 583 P.2d 1281; *People v. McGee* (1977) 19 Cal.3d 948, 961, 140 *1389 Cal.Rptr. 657, 568 P.2d 382; *City of Los Angeles v. Rancho Homes, Inc.* (1953) 40 Cal.2d 764, 770–771, 256 P.2d 305.) The commission's interpretation of the Act as authorizing it to award punitive damages was not, however, "contemporaneous." Not until 1980—more than 20 years after the Act's enactment—did the commission undertake to award damages. (See fn. 9, ante.) The final meaning of a statute, moreover, rests with the courts. An administrative agency cannot by its own regulations create a remedy which the Legislature has withheld. (*Commodore Home,* supra, 32 Cal.3d at p. 227, 185 Cal.Rptr. 270, 649 P.2d 912 (dis. opn. of Richardson, J.); see *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 117, 172 Cal.Rptr. 194, 624 P.2d 244; *J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 29, 160 Cal.Rptr. 710, 603 P.2d 1306; *Morris v. Williams* (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 433 P.2d 697.) " 'Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.' [*Morris v. Williams,* supra, ***72 and cases cited.] And this is the rule even when, as here, 'the statute is subsequently reenacted without change.' [Citation.]" (*American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 618–619, 186 Cal.Rptr. 345, 651 P.2d 1151 (dis. opn. of Mosk, J.). See also *Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 718–719, 199 Cal.Rptr. 546.)

We take no issue with the premise that exemplary damages would serve to deter discrimination. Nor do we dispute that the phrase "including, but not limited to" is a phrase of enlargement. (See *American National Ins. Co. v. Fair Employment & Housing Com.,* supra, 32 Cal.3d at p. 611, 186 Cal.Rptr. 345, 651 P.2d 1151 (dis. opn. of Mosk, J.); *Fraser v. Bentel* (1911) 161 Cal. 390, 394, 119 P. 509; 2A Sutherland, Statutory Construction (4th ed. 1984) § 47.07, p. 133 [hereafter Sutherland].) Nevertheless, given the extraordinary nature of punitive damages, these factors, in our view, are insufficient to support an inference that the Legislature intended sub silentio to empower the commission to impose punitive damages. Commission's argument, taken to its logical conclusion, would authorize every administrative agency granted remedial powers to impose punitive damages so long as the statute directs that its provisions are to be liberally construed to effectuate its purposes.[10]

Seeking to alleviate concern that a "flood of agencies" would arrogate to themselves similar authority, Commission states that only four other agencies have been granted comparable statutory authority to order actions that will effectuate the purposes of the acts they enforce—the Agricultural Labor *1390 Relations Board (ALRB) (Lab.Code, § 1160.3); the Public Employment Relations Board (PERB) (§ 3541.5); the State Personnel Board (§ 19702, subd. (e)); and **1329 the California Horse Racing Board (Bus. & Prof.Code, § 19440)—and none awards punitive damages.

That no similarly empowered agency awards punitive damages lends support, in our view, to the conclusion that the power to make punitive assessments will not be implied merely from a legislative directive that an act's remedial provisions are to be liberally construed to

effectuate its purposes. Indeed, in *Youst v. Longo,* supra, 43 Cal.3d 64, 233 Cal.Rptr. 294, 729 P.2d 728, we specifically determined that the broad powers the Legislature vested in the California Horse Racing Board do not include the power to award compensatory or punitive tort damages. "[T]he power to award compensatory and punitive tort damages to an injured party is a judicial function. Although the [Horse Racing] Board has very broad power to regulate and discipline wrongful conduct which involves horseracing in California, the relevant statutes do not authorize affirmative compensatory relief such as tort damages." (Id. at p. 80, 233 Cal.Rptr. 294, 729 P.2d 728, emphasis omitted.)

As the United States Supreme Court stated in another context: "[I]t is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end. [¶] ... [A]ffirmative action to 'effectuate the policies of this Act' is action to achieve the remedial objectives which the Act sets forth." (*Republic Steel Corp. v. Labor Board* (1940) 311 U.S. 7, 12, 61 S.Ct. 77, 79, 85 L.Ed. 6; accord, *Carpenters Local v. Labor Board* (1961) 365 U.S. 651, 655, 81 S.Ct. 875, 877, 6 L.Ed.2d 1; see *Laflin & Laflin v. Agricultural Labor Relations Bd.* (1985) 166 Cal.App.3d 368, 380–381, 212 Cal.Rptr. 415.)

A more reasonable reading of the phrase "including, but not limited to," is that the Legislature intended to authorize the commission ***73** to take such other remedial action as in its judgment seems appropriate to redress a particular unlawful employment practice and to prevent its recurrence, thus eliminating the practice.[11] A reading of the phrase as permitting only additional corrective remedies ***1391** comports with the statutory construction doctrines of *ejusdem generis,*[12] *expressio unius est exclusio alterius*[13] and *noscitur a sociis.*[14] (See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* supra, 25 Cal.3d at pp. 330–331, 158 Cal.Rptr. 370, 599 P.2d 676 [applying *ejusdem generis*]; see also *Richerson v. Jones* (3d Cir.1977) 551 F.2d 918, 927 [*ejusdem generis* invoked in concluding that the Federal Equal Employment Opportunity Act of 1972 does not authorize punitive assessments].) Although ****1330** these canons of construction are mere guides and will not be applied so as to defeat the underlying legislative intent otherwise determined (*Cal. State Employees' Assn. v. Regents of University of California* (1968) 267 Cal.App.2d 667, 670, 73 Cal.Rptr. 449), their application here to limit the commission's authority to the ordering of corrective, nonpunitive action is consistent with both the remedial purpose of the Act and the ordinary import of the statutory language.

This reading, moreover, harmonizes the various parts of the statute. Section 12964, referring to resolution of allegedly unlawful practices through conciliation, provides that "such resolutions may be in the nature of, but are not limited to, types of remedies that might be ordered after accusation and hearing," i.e., the section 12970 remedies. While the corrective remedies enumerated in section 12970 are appropriate to impose in the context of a resolution by conciliation, punitive damages are antithetical to the conciliation process and, as indicated, are not "in the nature of" the type of remedy authorized by section 12970.

A construction of section 12970 that limits the commission to corrective, nonpunitive remedies also harmonizes the Act with the statutory provisions governing the award of punitive damages in civil actions. Civil Code section 3294, subdivision (a) allows the award of exemplary damages only when the defendant has been guilty of "oppression, fraud, or malice." ***1392** This provision codifies the universally recognized principle that "[t]he law does not favor punitive damages and they should be granted with the greatest caution." (*Beck v. State Farm Mut. Auto. Ins. Co.* (1976) 54 Cal.App.3d 347, 355, 126 Cal.Rptr. 602.) Although the commission evidently has adopted the statutory standard, nothing in the FEHA requires it to do so or provides any guidelines for the award of punitive damages.[15]

***74** Further, subdivision (b) of Civil Code section 3294 provides that in an action for the breach of an obligation not arising out of contract, an employer shall not be liable for exemplary damages based on the conduct of his employee unless "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct ... or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." Because the FEHA contains no comparable limitation on an employer's liability for his employee's wrongful acts (see §§ 12926, subd. (c), 12940, subd. (a)), interpreting the Act as authorizing the commission to award punitive damages would expose an employer in an administrative proceeding to greater derivative liability than in a judicial action.

Finally, Civil Code section 3295 precludes discovery of a defendant's financial condition in actions seeking exemplary damages until the plaintiff has established a prima facie entitlement thereto. (See generally *Rawnsley v. Superior Court* (1986) 183 Cal.App.3d 86, 90–91, 227 Cal.Rptr. 806.) This protection is inapplicable to administrative proceedings (see Code Civ.Proc., § 22 [defining "action"]) and no comparable provision appears in the FEHA.

Statutes are to be given a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent "and which, when applied, will result in wise policy rather than mischief or absurdity." (*Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 Cal.App.3d 1122, 1136, fn. 11, 203 Cal.Rptr. 886.) Absent express language dictating otherwise, it will not be presumed that the Legislature intended to authorize an administrative agency—free of guidelines or limitation **1331 —to award punitive damages in proceedings lacking the protections mandated in a court of law.

*1393 As we recognized in a related context, the Legislature's objective in providing for an administrative rather than a judicial resolution of discrimination complaints was to provide a "speedy and informal" process unburdened with "procedural technicalities." (*Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205, 214, 98 Cal.Rptr. 467, 490 P.2d 1155 [concerning transfer to the Commission's precedessor of housing discrimination complaints].) "To achieve this end the [Fair Employment Practice Commission] established procedures that are as simple and uncomplicated as possible. Complaints are drafted by laymen; the commission informally attempts to eliminate discriminatory practices before instituting formal accusations; the commission, on a finding of discrimination, may fashion remedies both to correct unique cases of such practice as well as to curb its general incidence." (Ibid.) The award of punitive damages—"traditionally ... limited to the judicial forum with its more extensive procedural protections" (*Commodore Home,* supra, 32 Cal.3d at p. 217, fn. 6, 185 Cal.Rptr. 270, 649 P.2d 912; see also *Curtis v. Loether* (1974) 415 U.S. 189, 196–197, 94 S.Ct. 1005, 1009–1010, 39 L.Ed.2d 260)—has no place in this scheme.

In sum, we are of the view that the statutory language, given its ordinary import and construed in context of the purposes and objectives of the law, together with the Legislature's silence on the issue of punitive damages, compels the conclusion that the Legislature did not intend to grant the commission authority to award punitive damages. If, as Commission argues, the inability to award such damages deprives it of an effective means to redress and prevent unlawful discrimination, it is for the Legislature, rather than this court, to remedy this defect. We are not, however, convinced that the commission lacks sufficient means to redress and eliminate discrimination. The Act authorizes class ***75 actions and permits the director of the department to address systematic problems, such as pattern and practice matters, by bringing a complaint on his or her own motion. (§§ 12960, 12961; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 867, 193 Cal.Rptr. 760.) The commission, in turn, has broad authority to fashion an appropriate remedy without resort to punitive damages. (See, e.g., fn. 11, ante; cf. *McDaniel v. Cory* (Alaska 1981) 631 P.2d 82, 88.) The statutory scheme provides for compliance review and judicial enforcement of commission orders (§ 12973) and makes it a misdemeanor offense for any person wilfully to violate an order of the commission (§ 12975).

Although we believe that statutory interpretation disposes of the issue, we nevertheless address the additional arguments advanced by the parties.

B. *Legislative History*

In support of their respective arguments, both parties cite the legislative history of the Act and the Legislature's failure since its enactment to modify it or adopt various proposed amendments.

*1394 As indicated above, the FEPA was enacted in 1959 (former Lab.Code, § 1410 et seq.). That same year the Legislature also enacted the Hawkins Act (former Health & Saf.Code, § 35700 et seq., enacted by Stats.1959, ch. 1681, § 1, pp. 4074–4077), prohibiting housing discrimination, and the Unruh Civil Rights Act (Civ.Code, §§ 51–52, enacted by Stats.1959, ch. 1866, §§ 1–4, p. 4424, replacing former Civ.Code, §§ 51–54, added by Stats.1905, ch. 413, §§ 1–4, pp. 553–554), prohibiting discrimination in business establishments. (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 500, 86 Cal.Rptr. 88, 468 P.2d 216 [concurrent enactment of FEPA and Civil Rights Act evinced legislative intent to exclude employment discrimination from the latter act].) While both the Hawkins and Unruh Acts provided for judicial relief and authorized the award of damages,[16] the FEPA **1332 provided for administrative relief and made no mention of damages.

In 1963 the Hawkins Act was replaced by the Rumford Fair Housing Act (former Health & Saf.Code, § 35700 et seq., enacted by Stats. 1963, ch. 1853, §§ 1–4, pp.

3823–3830), which for the first time afforded an administrative remedy for housing discrimination. Although the Rumford Act retained language authorizing the award of damages, it transformed the statutory minimum recoverable in judicial proceedings (see fn. 16, ante) into a statutory maximum in administrative proceedings.[17] In 1980 the employment and housing statutory schemes were combined to form the FEHA, with enforcement of both sections of the Act vested in the commission. (Stats.1980, ch. 992, § 4, pp. 3140–3142.)

Dyna–Med argues that in light of the parallel development of legislation governing employment and housing discrimination and the ultimate union of the respective acts in one, with common enforcement procedures, it is significant that the Legislature, while authorizing the award of damages in housing cases, has never done so in employment cases. Had the Legislature intended to authorize the commission to ***76 award damages in employment **1395** cases, it knew how to do so, as it demonstrated in enacting the other civil rights statutes.

Commission, in turn, asserts that the separate origins of the housing and employment discrimination statutes explain why one explicitly allows damages and the other does not. Moreover, the remedy provisions in the housing section expressly note punitive damages only to limit their availability. (§ 12987, subd. (2).)[18] Consequently, the absence of any express reference to such damages within the employment context should be construed not as a lack of authority, but rather, as a lack of limitation on such damages.

Commission's argument is unpersuasive. A review of the relevant statutes discloses that when the Legislature intends to authorize an agency to award damages for discrimination, it does so expressly (e.g., § 12987, subd. (2) [housing]; § 19702, subd. (e) [civil service]; cf. Civ.Code, § 52, subd. (a) [civil action against business establishments]), and when it authorizes the award of a penalty or punitive damages, it limits the amount (§ 12987, subd. (2) [$1,000]; cf. Civ.Code, § 52, subd. (a) [no more than three times actual damages]).

Commission observes that since 1980 when it first interpreted the FEHA as authorizing the award of punitive damages, the Legislature has amended the Act several times without addressing the remedy provisions.[19] This inaction, Commission argues, is an indication that its ruling was consistent with the Legislature's intent. (See *Coca–Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 922, 156 P.2d 1; *Action Trailer Sales, Inc. v. State Bd. of* **1333 *Equalization* (1975) 54 Cal.App.3d 125, 133–134, 126 Cal.Rptr. 339.)

Dyna–Med, by contrast, relies on a bill introduced but not enacted by the Legislature in 1976 (Assem. Bill No. 3124, 2 Assem. Final Hist. (1975–1976 Sess.) p. 1658), which would expressly have authorized the commission to award limited damages in employment discrimination cases, and on the provision of Senate Bill No. 2012, introduced in 1984, which would have amended section 12970, subdivision (a) to specifically authorize compensatory and punitive damages as "declaratory of existing law," but which was removed before the bill's enactment (see Stats.1984, ch. 1754, § 3, p. 6406).

1396 We find the subsequent legislative history of the statute ambiguous and of little assistance in discerning its meaning. The Legislature's failure to modify the statute so as to require an interpretation contrary to the commission's construction is not determinative: "[A]n erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change. [Citations.]" (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757–758, 151 P.2d 233.) Similarly inconclusive is the Legislature's rejection of specific provisions which would have expressly allowed the award of damages. Unpassed bills, as evidences of legislative intent, have little value. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735, fn. 7, 180 Cal.Rptr. 496, 640 P.2d 115; *Miles v. Workers' Comp. Appeals Bd.* (1977) 67 Cal.App.3d 243, 248, fn. 4, 136 Cal.Rptr. 508; see also *United States v. Wise* (1962) 370 U.S. 405, 411, 82 S.Ct. 1354, 1358, 8 L.Ed.2d 590; 2A Sutherland, supra, § 49.10, pp. 407–408.) This is particularly true here, where the rejected provisions manifest conflicting legislative intents: the 1976 provision would have limited the amount of damages the commission could award; the 1981–1982 provisions would have prohibited the commission from awarding punitive damages (see fn. 19, ***77 ante); and the 1984 amendment would have authorized the award of compensatory and punitive damages "as declaratory of existing law." (See generally *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 58, 69 Cal.Rptr. 480.)

[2] Were we, however, to consider unpassed legislation, we would find it significant that at the same time the Legislature rejected the provision declaring the commission's authority to award damages, it amended the Civil Service Act to grant the Personnel Board authority identical to the commission's, *plus* the power to award compensatory damages. (Stats.1984, ch. 1754, § 6, pp. 6408–6409; see § 19702, subd. (e).)[20] Where the

Legislature simultaneously empowers one agency to award damages and declines similarly to empower another, there is a strong inference of a legislative intent to withhold the authority from the nonempowered agency. (See *City of Port Hueneme v. City of Oxnard* (1959) 52 Cal.2d 385, 395, 341 P.2d 318.)

*1397 Further, if, as Commission argues, the nonexhaustive language of section 12970 were sufficient to embrace the authority to award damages, the specific references to damages in both the Civil Service Act and the housing section of the FEHA[21] would **1334 be mere surplusage. "[S]tatutes must be harmonized, both internally and with each other, to the extent possible. [Citations.] Interpretive constructions which render some words surplusage ... are to be avoided. [Citations.]" (*California Mfrs. Assn. v. Public Utilities Com.*, supra, 24 Cal.3d at p. 844, 157 Cal.Rptr. 676, 598 P.2d 836.)

As Justice Richardson, dissenting in *Commodore Home,* stated: "The express provision for damages in this parallel statutory scheme [the housing section of the FEHA]—strongly suggests ... that the omission of [a punitive damages remedy] from the employment discrimination provisions was intentional. The Legislature has clearly demonstrated that it knows how to add a punitive remedy to this statute when it wishes to do so." (32 Cal.3d at p. 225, 185 Cal.Rptr. 270, 649 P.2d 912.)

C. *Federal and Other State Legislation*

The remedy language of section 12970 bears a close resemblance to section 10(c) of the National Labor Relations Act (NLRA) (29 U.S.C.A. § 151 et seq., § 160(c)) relating to unfair labor practices, which authorizes the National Labor Relations Board (NLRB) to issue a cease and desist order and require the violator "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter...." Federal courts have continually interpreted the NLRA as not allowing monetary remedies other than back pay. (See *Edison Co. v. Labor Board,* supra, 305 U.S. 197, 235–236, 59 S.Ct. 206, 219–220, 83 L.Ed. 126; *Van Hoomissen v. Xerox Corporation* (N.D.Cal.1973) 368 F.Supp. 829, 837; see also ***78 *Commodore Home,* supra, 32 Cal.3d at p. 224, 185 Cal.Rptr. 270, 649 P.2d 912 (dis. opn. of Richardson, J.).) Title VII of the federal Civil Rights Act of 1964, relating to employment discrimination, in section 706(g) similarly authorizes the trial court to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate." (42 U.S.C.A. § 2000e–5(g).) This language, which was *1398 modeled after the NLRA (*Richerson v. Jones,* supra, 551 F.2d 918, 927), also has been interpreted by the majority of federal courts as barring monetary remedies other than back pay (*Great American Fed. S. & L. Assn. v. Novotny* (1979) 442 U.S. 366, 374–375, 99 S.Ct. 2345, 2350, 60 L.Ed.2d 957; see, e.g., *Shah v. Mt. Zion Hospital & Medical Ctr.* (9th Cir.1981) 642 F.2d 268, 272; *Richerson v. Jones,* supra, at pp. 926–927; *Van Hoomissen v. Xerox Corporation,* supra, 368 F.Supp. 829, 836–838; *Commodore Home,* supra, 32 Cal.3d at p. 225, 185 Cal.Rptr. 270, 649 P.2d 912 and cases cited (dis. opn. of Richardson, J.)).

Dyna–Med invokes the principle that the use of identical language in analogous statutes requires like interpretation. (*Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557, 147 Cal.Rptr. 165, 580 P.2d 665.) Commission argues that the foregoing principle is inapposite because of the limiting reference in the NLRA to *affirmative* action and in title VII to *equitable* relief, as contrasted with section 12970's reference without modification to "action." Commission points further to the differing purposes of the NLRA and the FEPA: the first exists to promote industrial peace and stability through collective bargaining and to create a cooperative atmosphere of recognition between labor and management (*Carey v. Westinghouse Corp.* (1964) 375 U.S. 261, 271, 84 S.Ct. 401, 409, 11 L.Ed.2d 320; *N.L.R.B. v. Pincus Bros., Inc.–Maxwell* (3rd Cir.1980) 620 F.2d 367, 372–373; *Bloom v. N.L.R.B.* (D.C.Cir.1979) 603 F.2d 1015, 1019), whereas the latter is designed to provide effective remedies to vindicate the individual's constitutional right to be free from employment discrimination and to eliminate discriminatory **1335 employment practices (*State Personnel Bd. v. Fair Employment & Housing Com.,* supra, 39 Cal.3d at 432, 217 Cal.Rptr. 16, 703 P.2d 354).

When first enacted, the FEPA, like the NLRA, combined the prosecutorial and adjudicative functions and provided only for administrative relief.[22] (Stats.1959, ch. 121, § 1, pp. 1999–2005; see *Commodore Home,* supra, 32 Cal.3d at p. 218, 185 Cal.Rptr. 270, 649 P.2d 912; cf. NLRA, § 10(b) & (c), 49 Stat. at pp. 453–454; *Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 24–25, 57 S.Ct. 615, 618, 81 L.Ed. 893; *Haleston Drug Stores v. National Labor Relations Bd.,* supra, 187 F.2d 418, 421.) The FEPA also contained the identical "affirmative action" language as the NLRA. (Stats.1959, supra, at p. 2004; *Commodore Home,* supra, 32 Cal.3d at p. 224, 185 Cal.Rptr. 270, 649 P.2d 912 (dis. opn. of Richardson, J.).) In 1969 the Legislature amended Labor Code section 1426 to delete the word "affirmative." (Stats.1969, ch.

526, § 1, p. 1142.) The legislative history *1399 suggests that this amendment was passed not to expand the power of the FEPC, but rather, to avoid confusion with the newly acquired meaning of "affirmative action" that was embraced in a 1967 amendment authorizing the FEPC to engage in "affirmative actions" with employers, employment agencies, and labor organizations.[23] (See former ***79 Lab.Code, §§ 1413, subd. (g), 1431, added by Stats.1967, ch. 1506, §§ 1–2, pp. 3573–3574; see now §§ 12927, subd. (a), 12988 [concerning housing discrimination].) Both the Enrolled Bill Report of the Department of Industrial Relations and the Enrolled Bill Memorandum of the Governor's Legislative Secretary state that the aim of the amendment was to "clear up any ambiguities ... between the two sections of the law. In other words," according to the report and memo, "*Affirmative Action* in AB 544 [the 1967 amendment] was a little broader than Affirmative Action in Section 1426 of the Labor Code [the remedies provision]." (Italics in original; see also *Commodore Home,* supra, 32 Cal.3d at p. 224, 185 Cal.Rptr. 270, 649 P.2d 912 (dis. opn. of Richardson, J.).) Deletion of the word "affirmative" thus is not dispositive of the Legislature's intent concerning application to the commission of federal precedent.

In *Commodore Home,* in the context of a civil action for punitive damages, we stated that differences between the federal laws and the FEHA—the NLRA provides no right of civil action and title VII provides only for judicial handling of federal discrimination claims—"diminish the weight of the federal precedents." (32 Cal.3d at p. 217, 185 Cal.Rptr. 270, 649 P.2d 912.) The NLRA, we observed, "specifies remedies the board may impose, and the cases hold merely that its language prevents *that agency* from assessing compensatory or punitive damages. [¶] Contrastingly, title VII ... expressly describes remedies that courts may assess.... [¶] The FEHA, on the other hand, provides separate routes to resolution of claims; first, a complaint to the Department; second, if that agency fails to act, a private court action. The statute discusses remedies only in the first context; here we are concerned with those available in the second. Federal precedents do not address that problem. [Fn. omitted.]" (Ibid., emphasis added.)

**1336 In the instant case, by contrast, the issue is the nature of administrative remedies—the only remedies provided by the NLRA and initially provided by the FEPA. In these circumstances federal precedent under the NLRA would seem to be apposite. Because the FEPA when first enacted had the *1400 identical language and procedure as the NLRA, it can reasonably be presumed that the Legislature intended the state agency to have the same powers—and only those powers—as its federal counterpart. (See *Belridge Farms v. Agricultural Labor Relations Bd.,* supra, 21 Cal.3d at p. 557, 147 Cal.Rptr. 165, 580 P.2d 665; cf. *Van Hoomissen v. Xerox Corporation,* supra, 368 F.Supp. at p. 837 [interpreting title VII in light of NLRA].) This is true notwithstanding the differing intents of the two acts, particularly since the remedial portion of each is designed to protect an employee against discriminatory practices.[24]

Although courts in other states are divided on the availability of compensatory damages under statutory schemes similar to the FEHA (see Annot. (1978) 85 A.L.R.3d 351, 356–357), we are unaware of any case upholding the award of punitive damages. Rather, the courts seem uniformly to hold that the authority of a state agency to assess exemplary damages must be express and will not be implied from a broad authority to implement the objectives of the fair employment statute. (E.g., *Woods v. Midwest Conveyor Co.* (1982) 231 Kan. 763, 648 P.2d 234, 244–245; *McDaniel v. Cory,* supra, 631 P.2d 82, 86–89; *Ohio Civil Rights Commission v. Lysyj* (1974) 38 Ohio St.2d 217, 313 N.E.2d 3, 6–7 [70 A.L.R.3d 1137]; see also ***80 *High v. Sperry Corp.* (S.D.Iowa 1984) 581 F.Supp. 1246, 1248; see Annot., supra, 85 A.L.R.3d at p. 357.)

D. *Equal Protection and Policy Considerations*

The FEHA, as indicated, provides two avenues for resolution of claims: "first, a complaint to the Department; second, if that agency fails to act, a private court action." (*Commodore Home,* supra, 32 Cal.3d at p. 217, 185 Cal.Rptr. 270, 649 P.2d 912; see §§ 12960, 12965, subd. (b).) Observing that punitive damages are available to persons who pursue court action (*Commodore Home,* supra, 32 Cal.3d at p. 221, 185 Cal.Rptr. 270, 649 P.2d 912), Commission argues that the denial of such damages to administrative complainants will create a disparate situation that will undermine the administrative avenue and thwart the Act's primary objective of resolving discrimination complaints through the administrative procedure: complainants will be encouraged to bypass the administrative forum in favor of court action; the department will forego seeking administrative relief in the most egregious cases when punitive damages are appropriate and be unable to engage in effective "conference, conciliation and persuasion" efforts to resolve the dispute (§ 12963.7); and because complete administrative relief *1401 will be unavailable, the victims of the most outrageous situations will be forced to await relief from our already overburdened courts.

Further, denying exemplary damages in the administrative

adjudication, Commission asserts, will create two classes of complainants: those who can afford to hire a private attorney and file a civil action and those "equally or even more deserving victims who lack the resources to pursue litigation by themselves and rely, instead, on the administrative process." Because economic standing is often strongly correlated with race, sex and other forms of prohibited discrimination (see *Brown v. Superior Court,* supra, 37 Cal.3d 477, 486, 208 Cal.Rptr. 724, 691 P.2d 272), denial of the opportunity to obtain a punitive damages award solely because of the complainant's economic or social circumstances is contrary to the Legislature's intent to eliminate discrimination and raises serious equal protection concerns.

**1337 Commission's policy and equal protection arguments rest on speculative and seemingly conflicting premises: on the one hand, that when a case is appropriate for punitive damages, complainants will bypass the administrative forum and the department will forego seeking administrative relief, thus defeating the Act's objective of administrative resolution; and, on the other hand, that given the substantial volume of complaints received, the department pursues only the most egregious cases, with the result that claimants with weaker cases who can afford to sue will have access to exemplary damages while the most worthy victims whose cases are heard by the commission will be denied such recompense. We are aware of no authority supportive of either premise. Although Justice Richardson, dissenting in *Commodore Home,* spoke of the anomaly of allowing punitive damages to "accusors who have been unsuccessful administratively before the commission, [while denying] such damages to those whose claims have been successfully established" (32 Cal.3d at p. 222, 185 Cal.Rptr. 270, 649 P.2d 916), this comment mistakenly assumes that a civil action is open only to those whose complaints the commission has refused to prosecute and overlooks the department's evident policy to permit any complainant to sue who wishes to, as well as the unlikelihood in any event of judicial recovery by a litigant whose claim the department has in fact found unworthy.

Concerning department policy, a former counsel to the department states: "Some respondents have asserted that a private right of action cannot be pursued before 150 days have passed, but this argument has not been accepted by most courts to which it is addressed. Because the investigation process ... takes time, and because the Department, as a matter of sound administrative policy, handles employment cases on a first-in-first-out basis, it is virtually impossible for an accusation to issue in ***81 an employment case before 150 days have passed. Furthermore, because of the incredible volume *1402 of cases handled by the Department—8,105 in fiscal year 1982—it would be a waste of resources to investigate a case the Department knows will be pursued in court. It is, therefore, the policy not to proceed on any case which will be pursued elsewhere. This decision is clearly within the Department's discretion...." (Gelb & Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination* (1983) 34 Hastings L.J. 1055, 1066, fn. 87; see *Commodore Home,* supra, 32 Cal.3d at p. 218, fn. 8, 185 Cal.Rptr. 270, 649 P.2d 912; *Carter v. Smith Food King* (9th Cir.1985) 765 F.2d 916, 922–923.)

Thus, while the department no doubt pursues only cases it deems meritorious (*State Personnel Bd. v. Fair Employment & Housing Com.,* supra, 39 Cal.3d at p. 434, fn. 14, 217 Cal.Rptr. 16, 703 P.2d 354; see *Mahdavi v. Fair Employment Practice Com.* (1977) 67 Cal.App.3d 326, 136 Cal.Rptr. 421; *Marshall v. Fair Employment Practice Com.* (1971) 21 Cal.App.3d 680, 98 Cal.Rptr. 698), because its case load precludes the pursuit of all such claims, any complainant who so wishes may bring a private court action. In these circumstances neither policy considerations nor equal protection concerns require that the administrative and judicial remedies be identical. To the contrary, the separate avenues justify different remedies. We recognized as much in *Commodore Home* where, having noted that "the FEHA leaves an aggrieved party on his own if the Department declines to pursue an administrative claim in his behalf," we stated that "[t]o limit the damages available in a lawsuit might substantially deter the pursuit of meritorious claims, ..." (32 Cal.3d at pp. 220–221, 185 Cal.Rptr. 270, 649 P.2d 912.)

Nor is an indigent complainant denied an equal opportunity to go to court. An eligible plaintiff may sue in forma pauperis (§ 68511.3, subd. (b); Cal.Rules of Court, rule 985; *Isrin v. Superior Court* (1965) 63 Cal.2d 153, 45 Cal.Rptr. 320, 403 P.2d 728) and a complainant whose case is appropriate for the award of punitive damages is unlikely to have difficulty finding an attorney willing to serve on a contingent fee basis. Further, the court has discretion to **1338 award litigation expenses to the successful employee. (§ 12965, subd. (b).)

One recognized purpose of punitive damages is to make a civil action economically feasible. As one commentator has stated: "All serious misdeeds cannot possibly be punished by government prosecution.... [L]imited judicial and prosecutorial resources permit prosecution for only a fraction of the crimes and violations committed. For these reasons, individual members of society must play a significant role in instituting actions to impose sanctions

for serious misconduct. Society's interest in bringing a wrongdoer to justice is especially strong where the wrongdoer's conduct exceeds all bounds of decency. [¶] The doctrine of punitive damages promotes this interest. By offering the potential for recovery in excess of actual ***1403** damages, the doctrine encourages plaintiffs to bring such actions. This is particularly important where actual damages are minimal.... Punitive damages thus can be characterized as a reward for the plaintiff's valuable role as a 'private attorney general.' Even where compensatory damages are substantial, an award of punitive damages helps to finance deserving claims by defraying the expenses of the action, such as attorneys' fees, that generally are not recoverable in American courts." (Mallor & Roberts, *Punitive Damages: Toward a Principled Approach* (1980) 31 Hastings L.J. 639, 649–650, fns. omitted.)

Moreover, in appropriate cases a complainant can seek punitive damages by filing an independent civil action alleging tort causes of action either with or without an FEHA count. (*Commodore Home,* supra, 32 Cal.3d at p. 220, 185 Cal.Rptr. 270, 649 P.2d 912; see *Brown v. Superior Court,* supra, 37 Cal.3d at pp. 486–487, 208 Cal.Rptr. 724, 691 P.2d 272; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 160 Cal.Rptr. 141, 603 P.2d 58; cf. *Alcorn v. Anbro Engineering, Inc.,* supra, 2 Cal.3d 493, 86 Cal.Rptr. 88, 468 P.2d 216.) "The FEHA was *****82** meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination." (*State Personnel Bd. v. Fair Employment & Housing Com.,* supra, 39 Cal.3d at p. 431, 217 Cal.Rptr. 16, 703 P.2d 354, citing § 12993, subd. (a).)

Although Commission asserts that denying it authority to award punitive damages will impede the administrative resolution of cases, the converse may well be true. As we recognized in *Commodore Home,* "One basis for federal holdings under title VII is a fear that the availability of punitive damages might hamper the EEOC's efforts to resolve discrimination disputes by 'conference, conciliation, and persuasion.' [Citations.]" (32 Cal.3d at p. 217, 185 Cal.Rptr. 270, 649 P.2d 912; cf. *Naton v. Bank of California* (9th Cir.1981) 649 F.2d 691, 699 [same re pain and suffering damages under Federal Age Discrimination in Employment Act].) In *Rogers v. Exxon Research & Engineering Co.* (3d Cir.1977) 550 F.2d 834, cited by the Ninth Circuit in *Naton,* supra, the court stated with respect to emotional distress damages: "While the existence of such an item of damages might strengthen the claimant's bargaining position with the employer, *it would also introduce an element of uncertainty which would impair the conciliation process.* Haggling over an appropriate sum could become a three–sided conflict among the employer, the Secretary, and the claimant." (Id. at p. 841, emphasis added.) A fortiori the availability without limitation of punitive damages—usually a matter within the broad discretion of the jury after consideration of the defendant's wealth, the egregiousness of his conduct and the amount of the plaintiff's actual damages (see *Wetherbee v. United Ins. Co. of America* (1971) 18 Cal.App.3d 266, 270–272, 95 Cal.Rptr. 678; BAJI No. 14.71 (7th ed. 1986); 4 Witkin, Summary of Cal.Law (8th ed. 1974) Torts, §§ 867–869, pp. 3155–3158, ***1404** 1984 Supp.) §§ 869A–869B, pp. 553–557)—would introduce an element of uncertainty detrimental to the conciliation process.

Nor does effective conciliation require that the administrative and judicial remedies be identical. Rejecting such a contention in *Commodore Home,* supra, we stated: "We are not persuaded. In the first ****1339** place there is no right to sue, even after conciliation breaks down, unless the Department fails to file an accusation before the Commission. To that extent the availability of court remedies remains within the Department's control. More importantly, the compliance structure of the FEHA encourages cooperation in the administrative process. While that process continues the Department acts on the victim's behalf and absorbs costs of pursuing his claim. Court action inevitably is speculative, and the FEHA makes civil suit the claimant's sole responsibility. That helps deter strategies of 'holding out' for court damages in inappropriate cases. Further, the possibility that an action might lead to punitive damages may enhance the willingness of persons charged with violations to offer fair settlements during the conciliation process. [Fn. omitted.]" (32 Cal.3d at p. 218, 185 Cal.Rptr. 270, 649 P.2d 912.)

In short, Commission's policy and equal protection arguments are fallacious. If a complainant wants relatively prompt restitutionary redress free of personal financial risk he or she can elect the administrative avenue of relief, with all expenses paid by the department. (*State Personnel Bd. v. Fair Employment Housing & Com.,* supra, 39 Cal.3d at p. 432, 217 Cal.Rptr. 16, 703 P.2d 354.) If, however, the complainant prefers to seek the potentially more lucrative redress of punitive damages, he or she can go to court like any other litigant.

III. CONCLUSION

In view of the foregoing, we conclude that the

commission is not authorized to award punitive damages.[25] The Court of ***83** Appeal therefore erred in affirming the judgment of the trial court.

The judgment of the Court of Appeal is reversed. The Court of Appeal is directed to enter judgment reversing the trial court and directing it to issue a writ of mandate commanding Commission to vacate and set aside that part of its decision awarding Olander punitive damages and thereafter to take such further action not inconsistent with this opinion as it deems appropriate.

LUCAS, C.J., and MOSK, ARGUELLES, EAGLESON and KAUFMAN, JJ., concur.

***1405** BROUSSARD, Justice, dissenting.

I dissent. I adopt part III of the well-reasoned opinion of the Court of Appeal (prepared by Justice Work and concurred in by Acting Presiding Justice Staniforth and Justice Wiener) as my own opinion, with a few alterations.[1]

Dyna–Med, [Inc. (Dyna–Med),] supported by amic[i] Merchants and Manufacturers Association (MMA) [and others],[2] set forth multiple challenges to the [Fair Employment and Housing] Commission's [(Commission)] authority to award punitive damages. In essence, they contend [the Fair Employment and Housing Act's ( ]FEHA [or act)] language and legislative history preclude awarding punitive damages at the agency level. They stress the statutory language, construed according to settled rules of statutory construction, does not empower the Commission to award punitive damages but limits it to remedial action designed to effectuate the underlying purposes of the act. Absent express legislative authorization, they argue it is the settled rule an administrative agency may not ****1340** lawfully impose a penalty, whether civil or criminal in character.

Moreover, emphasizing the similarity between the language of title VII of the Federal Civil Rights Act of 1964 (title VII) and the FEHA, Dyna–Med relies on federal court precedent holding punitive damages are not available. Additionally, noting the housing discrimination provisions of the FEHA specifically authorize the Commission to order the payment of "punitive damages in an amount not to exceed one thousand dollars ($1,000)" ([Gov.Code,] § 12987, subd. (2) [all further statutory references are to the Government Code unless otherwise indicated]), it argues the express provision for such punitive damages in a parallel statutory scheme strongly suggests the omission of this remedy from the employment discrimination provisions was intentional. (See *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 225 (dis. [opn.]) [185 Cal.Rptr. 270, 649 P.2d 912].) Consequently, [Dyna–Med] contends that had the Legislature intended to allow recovery of extraordinary remedies such as punitive damages within the employment context, it could and would have expressly so provided. Dyna–Med asserts its construction is compelled by public policy, claiming injecting punitive damages within this administrative context furthers neither the general principle of equal employment opportunity, nor voluntary resolution and conciliation. Finally, [Dyna–Med] stress[es] that procedures ***1406** of administrative agencies often disregard traditional rules of evidence, severely limit discovery and are unfettered by safeguards insuring due process to litigants in the courts.

Applying the rules of construction summarized in *Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 Cal.App.3d 1122, 1136 [–1137], fn. 11 [***84** 203 Cal.Rptr. 886], we [must] interpret the FEHA to ascertain and effectuate the purpose of the law, attempting to give effect to the usual and ordinary import of the statutory language; harmonizing any provision within the context of the statutory framework as a whole; seeking a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent, practical rather than technical in character and upon application resultant of wise policy rather than absurdity; and, considering generally the context, the object in view, the evils to be remedied, the history of the times, legislation upon the same subject, public policy and contemporaneous construction.

The [Fair Employment Practice Act ( ]FEPA[ )] was enacted in 1959 and recodified in 1980 as part of the FEHA. The FEHA sets forth a comprehensive scheme for combating employment discrimination, recognizing "the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination. (§ 12920.)" (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 485 [208 Cal.Rptr. 724, 691 P.2d 272].) The act declares that freedom from discriminatory practices in seeking, obtaining, and holding employment is a civil right. (§ 12921.) In fact, section 12920 recognizes "the practice of denying employment opportunity and discriminating [in] the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its

capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." Such discrimination is contrary to public policy (§ 12920) and is an unlawful employment practice (§ 12940). The express underlying purpose of the act is "to provide effective remedies which will eliminate such discriminatory practices." (§ 12920.) The Legislature has directed that the FEHA is to be construed "liberally" to accomplish its underlying purposes. (§ 12993.)[3]

**1341 The FEHA establishes the Department [of Fair Employment and Housing (the Department)] (§ 12901) to investigate, conciliate, and seek redress of claimed discrimination (§ 12930). Complaints (§ 12960) must be promptly *1407 investigated (§ 12963). If it deems a claim valid, then it seeks to resolve the matter—in confidence—by conference, conciliation, and persuasion. (§ 12963.7.) If that fails or seems inappropriate the Department may issue an accusation to be heard by the Commission. (§§ 12965, subd. (a), 12969; see too § 12930.) The Commission then determines whether an accused employer, union, or employment agency has violated the act. If it finds a violation it must "issue ... an order requiring such [violator] to cease and desist from such unlawful practice and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part...." (§ 12970, subd. (a).) If the Department fails to issue an accusation within 150 days after the filing of the complaint and the matter is not otherwise resolved, it must give complainant a right-to-sue letter. Only then may that person sue in the superior court under the FEHA (§ 12965, subd. (b)).[4] (See *Commodore* ***85 *Home Systems, Inc. v. Superior Court, supra,* 32 Cal.3d 211, 213–214 [185 Cal.Rptr. 270, 649 P.2d 912]; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 865–868 [193 Cal.Rptr. 760]; see also *State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal.3d 422, 432 [–433, 217 Cal.Rptr. 16, 703 P.2d 354].)[5]

[My] conclusion [that] the Commission is empowered to award punitive damages arises from the statutory authority summarized above. It is undisputed an administrative agency's power to award such damages must arise from express statutory authorization. Here, the Legislature delegated broad authority to the Commission to fashion appropriate remedies for unlawful employment practices in section 12970, subdivision (a): "If the commission finds that a respondent has engaged in any unlawful practice under this *1408 part, it ... shall issue and cause to be served on the parties an order requiring such respondent ... to take such action, *including, but not limited to,* hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, *as, in the judgment of the commission, will effectuate the purposes of this part,* and including a requirement for report of the manner of compliance." (Italics added.) Attempting to harmonize this specific provision in context of the entire statutory framework, [I] find in section 12920 the underlying purpose of the act is to provide effective remedies to eliminate discriminatory employment practices. Consequently, considering the legislative mandate to liberally construe the act to further these purposes **1342 (§ 12993), [I] conclude it has statutorily authorized the Commission to impose punitive damages where necessary to effectively remedy and eliminate unlawful FEHA employment practices. For, the Commission " 'may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers. [Citations.]' " (*Leslie Salt Co. v. San Francisco Bay Conservation Com.* (1984) 153 Cal.App.3d 605, 617 [200 Cal.Rptr. 575] [quoting *Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 810, 151 P.2d 505.])

Contrary to Dyna–Med's assertions, imposing punitive damages for deliberate violations is designed to effectively eliminate discriminatory employment practices. Potential liability for punitive damages is a substantial incentive for employers to eliminate, or refrain from committing, unlawful employment practices. Further, the possibility of "punitive damages may enhance the willingness of persons charged with violations to offer fair settlements during the conciliation process. [Fn. omitted.]" (*Commodore Home Systems, Inc. v. Superior Court, supra,* 32 Cal.3d 211, 218 [185 Cal.Rptr. 270, 649 P.2d 912].) Moreover, such damages are designed not only to punish the wrongdoer, but also to set an example to deter others from similar conduct.

The facts of this case prove ordinary restitutionary remedies are often ineffective in eliminating discriminatory practices. Awards of back pay are frequently insignificant because interim earnings are deducted or offset. Also, the value of reinstatement may be negligible because by ***86 the time employment discrimination cases are resolved, the plaintiff has had to find another job. Upgrading, back pay and reinstatement in cases of retaliation may not be effective deterrents or satisfactory remedies for complainants because the original work environment may no longer be conducive to continued employment. Consequently, in light of the

limited remedial effect of these permissible compensatory remedies, the award of punitive damages may be the only method of fulfilling the purposes of the act, including encouraging plaintiffs to seek relief by increasing their potential recovery ***1409** see *Claiborne v. Illinois Central Railroad* (E.D.La.1975) 401 F.Supp. 1022, 1026, affd. in part and vacated in part (5th Cir.1978) 583 F.2d 143).

Although the language of section 12970, subdivision (a) is broad enough to encompass the award of punitive damages, Dyna–Med challenges this construction, claiming the statutory construction doctrines of *ejusdem generis,*[6] *expressio unius est exclusio alterius,*[7] and *noscitur a sociis*[8] compel a narrow interpretation limiting the Commission to ordering only affirmative, equitable, remedial relief.

Dyna–Med argues applying the doctrine of *ejusdem generis* to section 12970, subdivision (a) requires the authorizing language to be viewed in the light of the limited nature of the remedies specifically listed before the general language. In other words, because the only remedy enumerated ****1343** involving the award of monetary or legal relief is the awarding of backpay [sic], it concludes the general remedy language may not be construed to expand the authorized remedies to embrace punitive damages, because the phrase is limited by specific examples of the relief available, all of which are traditional "make-whole" remedies. It asserts the same result is arrived at by employing the other cited rules of statutory construction, because the Legislature demonstrated an intent not to authorize the exercise of any additional power unequivocally empowering the Commission to take affirmative action and then listing examples of such affirmative "make-whole" relief.

Properly analyzed, these rules do not sustain Dyna–Med's proffered statutory construction. These principles are mere guides to determining legislative intent and will not be applied to defeat the underlying legislative intent. (*Cal. State Employees' Assn. v. Regents of University of California* (1968) 267 Cal.App.2d 667, 670 [73 Cal.Rptr. 449]; *Claiborne v. Illinois Central Railroad, supra,* 401 F.Supp. 1022, 1026.) Moreover, in evaluating legislative ***1410** intent from first gleaning the language of the statute, we should seek to avoid making any language mere surplusage and thus rendered useless. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224]; *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297, 305 [193 Cal.Rptr. 343].) Applying the proffered rules of statutory construction effectively deprives the phrase "including but not limited to" of any meaning, when in fact it evinces clear legislative intent to *****87** expand, not limit, the list of remedies. (See *America National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 611 [186 Cal.Rptr. 345, 651 P.2d 1151] (dis. opn.); *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1977) 69 Cal.App.3d 884, 890 [138 Cal.Rptr. 509].)

Dyna–Med next argues the underlying legislative history of the FEHA, and specifically section 12970, shows the Commission did not intend to allow punitive damages. It argues the FEHA was modeled after the remedy language of the National Labor Relations Act (NLRA) which has been interpreted as not permitting punitive damages; the FEHA authorizes "affirmative action including (but not limited to)" similar to the NLRA which has been construed by the courts as authorizing only remedial relief; and the Legislature's enactment of a parallel statutory scheme relating to housing discrimination expressly providing for punitive damages suggests the omission of this remedy from the employment discrimination provisions was intentional.

The cited language of subdivision (a) of section 12970 appeared originally in former Labor Code section 1426, adopted in 1959 as part of the FEPA, which was later recodified and substantially reenacted in section 12970, subdivision (a). Without question, the phrase in dispute resembles section 10(c) of the NLRA (29 U.S.C.A. § 151 et seq., § 160(c)), which directs the National Labor Relations Board (NLRB) upon a finding of an unfair labor practice to issue a cease and desist order requiring the violator to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the polices of the [the Act]...." This language in 1938 was interpreted by the United States Supreme Court as not allowing punitive damages. (*Edison Co. v. Labor Board* (1938) 305 U.S. 197, 235–236 [59 S.Ct. 206, 219–220, 83 L.Ed. 126, 143]).[9]

***1411 **1344** In 1969, the word "affirmative" preceding the word "action" was removed from section 12970, subdivision (a). (Stats.1969, ch. 526, § 1, p. 1142.)[10] Because this language was not otherwise modified in any relevant manner by the Legislature, Dyna–Med relies on federal precedent construing the NLRA as well as title VII of the Federal Civil Rights Act of 1964 which contains similar language within section 706(g), authorizing the trial court to enjoin intentional violations of the Civil Rights Act and to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate...." (42 U.S.C. § 2000e–5(g).)[11] Its reliance on federal *****88** precedent is misplaced.[12]

Critical differences between the NLRA and the FEHA convince [me] the federal precedent is not apposite. (See, e.g., *Edison Co. v. Labor Board, supra,* 305 U.S. 197, 235–236 [83 L.Ed. 126, 143 [59 S.Ct. 206, 219–220]]; see also, *Pearson v. Western Elec. Co., etc.* (10th Cir.1976) 542 F.2d 1150, 1152; *Van Hoomissen v. Xerox Corporation* (N.D.Cal.1973) 368 F.Supp. 829, 837.) Granted, " '[w]hen legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would ***1412** be given a like interpretation. This rule is applicable to state statutes which are patterned after the federal statutes. [Citations.]' " (*Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665], quoting *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, 688–689 [8 Cal.Rptr. 1, 355 P.2d 905]; *Union Oil Associates v. Johnson* (1935) 2 Cal.2d 727, 734–735 [43 P.2d 291, 98 A.L.R. 1499].) However, this recognized principle of statutory construction rests upon the predicate the latter statute involved the same or an analogous subject which has similar [or] identical language. Here, the subjects are not analogous. The underlying purposes of the NLRA and the FEHA (or FEPA) differ. The former exists to prevent industrial unrest and strife or, in other words, to promote industrial peace (*Carey v. Westinghouse Corp.* (1964) 375 U.S. 261, 271 [84 S.Ct. 401, 409, 11 L.Ed.2d 320, 328]), while the latter exists to eliminate specific discriminatory practices ****1345** (*State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal.3d 422, 432, 217 Cal.Rptr. 16, 703 P.2d 354). More specifically, the NLRA regulates and encourages collective bargaining between employers and employees (*Carey v. Westinghouse Corp., supra,* 375 U.S. at p. 271 [84 S.Ct. at p. 409, 11 L.Ed.2d at p. 328]; *N.L.R.B. v. Pincus Bros., Inc.–Maxwell* (3d Cir.1980) 620 F.2d 367, 376; *Bloom v. N.L.R.B.* (D.C.Cir.1979) 603 F.2d 1015, 1019), while the FEHA makes employment discrimination against certain enumerated groups illegal. The former is designed to protect the rights of workers to organize into bargaining units and to create a cooperative atmosphere of recognition between labor and management. (See *N.L.R.B. v. Knuth Bros., Inc.* (7th Cir.1976) 537 F.2d 950, 957.) On the other hand, the latter is designed to protect the individual's constitutional right to be free from discrimination within the employment setting (*State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal.3d at p. 432 [217 Cal.Rptr. 16, 703 P.2d 354]), not to create a spirit of cooperation between labor and management. Instead, the FEHA was designed to provide an efficient administrative remedy to enforce an employee's right to be treated equally and to insure employers refrain from committing discriminating employment practices. Moreover, the NLRA does not provide a claimant with an analogous right to independently pursue an unfair labor practices claim in the courts upon administrative default or issuance of a right-to-sue letter, while the FEHA provides *****89** both judicial and administrative remedial procedures, requiring sensitivity to consistency in available relief.[13]

***1413** Dyna–Med's reliance on title VII cases is similarly misplaced. (See, e.g., *Shah v. Mt. Zion Hospital & Medical Ctr.* (9th Cir.1981) 642 F.2d 268, 272; *DeGrace v. Rumsfeld* (1st Cir.1980) 614 F.2d 796, 808; *Richerson* ****1346** *v. Jones, supra,* 551 F.2d 918, 926; *Pearson v. Western Electric Co., supra,* 542 F.2d 1150, 1152.) 42 United States Code section 2000e–5(g) of title VII significantly provides: "[T]he court may ... order such affirmative action as may be appropriate, which may include, but is not limited to, ... *or any other equitable relief* as the court deems appropriate." (Italics added.) Several decisions have focused on this phrase "any other equitable relief" in determining that punitive damages are not awardable, for they are traditionally not available in equity. (See *Shah v. Mt. Zion Hospital & Medical Ctr., supra,* 642 F.2d 268, 272; *Miller v. Texas State Bd. of Barber Examiners* (5th Cir.1980) 615 F.2d 650, 654; *Richerson v. Jones, supra,* 551 F.2d 918, 927.) Consequently, these courts have understandably held the explicit reference to *equitable,* and the silence with regard to *legal,* relief suggests the unavailability of punitive damages under title VII. In contrast, the FEHA expressly empowers the Commission to take whatever *action* is necessary to effectuate its policies, without an express limitation to equitable relief or complete silence as to legal relief. The absence of such qualifying language ***1414** and complete silence regarding legal damages in the FEHA further dissuades [me] from following the cited federal precedent.[14]

*****90** [ ] [T]he FEHA provides alternative avenues of relief through either the administrative or the judicial process. As already explained, both procedures commence with the filing of a complaint with the Department. (§ 12960.) Under the judicial route, a complainant receives a right-to-sue notice and files an action in court. (§ 12965, subd. (b).) Under the administrative route, the Department investigates the complaint (§ 12963), conducts discovery (§§ 12963.1–12963.5), attempts conciliation (§ 12963.7), files an accusation with the Commission (§ 12965, subd. (a)), and presents the case to the Commission (§ 12969). The decision, however, whether to go to court does not rest

with the claimant. Rather, the Department has exclusive jurisdiction over the case for 150 days (§§ 12960, 12965, subd. (b)), and must give a right-to-sue letter to the claimant if an accusation is not issued within the time period before the claimant may file a court action. However, although this private right of action under section 12965, subdivision (b), appears to be contingent upon the Department's decision not to prosecute or the lapse of 150 days, "[a]s a practical matter ... parties who ****1347** intend to pursue their case in court are given 'right to sue' letters in every case, even ***1415** in advance of the 150–day limit." (*State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal.3d 422, 433, fn. 11 [217 Cal.Rptr. 16, 703 P.2d 354].) Where the Department decides to administratively handle the case, the complainant may not pursue a civil action. (See generally *Snipes v. City of Bakersfield, supra,* 145 Cal.App.3d 861, 865–868 [193 Cal.Rptr. 760].) In essence, this administrative process was designed to be supported completely by the Department's own staff of investigators, attorneys and other personnel to prosecute the alleged violation rather than bestowing that responsibility upon a complainant. (See [*State Personnel Bd., supra* 39 Cal.3d], at p. 432 [217 Cal.Rptr. 16, 703 P.2d 354].) In fact, the [L]egislature originally provided for only the administrative route and later added the judicial avenue of relief, but retained the former apparently to highlight its intent the administrative process was designed to handle the bulk of the cases and its belief the administrative process would operate effectively to eliminate employment discrimination. Indeed, "[t]he FEPC has been entrusted with the duty of effectuating the declared policy of the state to protect and safeguard the rights and opportunities of all persons to seek, obtain and hold employment without discrimination." (*****91** *Northern Inyo Hosp. v. Fair Emp. Practice [ ] Com.* (1974) 38 Cal.App.3d 14, 25 [112 Cal.Rptr. 872].)

In *Commodore Home Systems, Inc. v. Superior Court, supra,* 32 Cal.3d 211, 221 [185 Cal.Rptr. 270, 649 P.2d 912], this [ ] Court held compensatory and punitive damages are available to persons who "elect" the judicial avenue of relief under the FEHA.[15] Thus, an anomaly arises if punitive damages are not likewise available within the administrative avenue of relief. As Justice Richardson pointed out in his dissent in *Commodore, supra,* at pages 222–223 [185 Cal.Rptr. 270, 649 P.2d 912], "it would be wholly anomalous to allow punitive damages to accusors [sic] who have been unsuccessful administratively before the commission, but to deny such damages to those whose claims have been successfully established. The result of any such disparity of remedy would be to encourage [claimants to file insufficient or inadequate] complaints with the commission in order to avoid or circumvent administrative proceedings in the hope of obtaining punitive damages in subsequent civil actions. Such a consequence would be contrary to FEHA's policy of eliminating employment discrimination through administrative 'conference, conciliation, and persuasion.' (Gov.Code, § 12963.7, subd. (a).)" Moreover, given the substantial volume of complaints received by the Department, if it pursued only the strongest cases with the most egregious FEHA violations, then ironically claimants with weaker cases who could afford to pursue judicial action would have access to compensatory and exemplary damages while stronger cases heard by the Commission would not. A construction permitting this would defeat ***1416** an underlying purpose for administrative relief, to wit, to provide an administrative scheme and forum for complainants to vindicate their employment rights, regardless of economic status. Indeed, public policy prohibiting employment discrimination practices cannot permit an individual claimant's affluence to determine whether he/she is entitled to effective relief. Absent the availability of similar relief, it is inevitable that equal protection violations will occur.[16]

****1348** Moreover, if the Commission is prohibited from awarding punitive damages while courts are free to do so, the underlying purposes of the administrative avenue of adjudication will be undermined. The Commission was created to interpret and implement the act and concomitantly to develop expertise in employment discrimination practices in California. (See § 12935; see generally *State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal.3d 422, 432 [217 Cal.Rptr. 16, 703 P.2d 354].) By establishing an administrative avenue of relief in the Commission with such expertise, the FEHA is designed to promote efficient resolution of discrimination complaints while removing additional pressure from the state's overburdened judicial system. In fact, if the Commission was prohibited from awarding punitive damages while the courts were free to do so, the Department might forego seeking administrative relief, thus delaying any relief *****92** and embroiling the discriminated person in unwanted courtroom proceedings. Further, this affects the fulfillment of the Department's role in that particular case with regard to conference, conciliation and persuasion efforts to resolve the dispute. [I] believe [this] construction [ ] provides "a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity." (*Honey Springs Homeowners Assn. [, Inc.] v. Board of Supervisors, supra,* 157 Cal.App.3d 1122, 1136,

fn. 11 [203 Cal.Rptr. 886]; *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 170 [154 Cal.Rptr. 263].)

Further, the Commission is authorized to interpret the FEHA both by regulation (§ 12935, subd. (a)(1)) and a system of precedential opinions ***1417** § 12935, subd. (h)). Although the ultimate interpretation of a statute rests with the courts, consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect and enforcing it, is entitled to great weight and will be followed unless clearly erroneous. (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 491 [156 Cal.Rptr. 14, 595 P.2d 592]; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 668 [150 Cal.Rptr. 250, 586 P.2d 564]; *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722].) [ ] [I]n 1980, the Commission promulgated title 2, California Administrative Code section 7286.9, subdivision (c) providing: "While normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious or inexcusable." Although this regulation was repealed in 1985 as setting forth an incorrect and misleading standard, the Commission held in *D.F.E.H. v. Ambylou Enterprises, Inc.* (1982) F.E.H.C. Dec. No. 82–06), compensatory and punitive damages are available under the FEHA (*id.*, at p. 8); punitive damages are designed to punish a wrongdoer and provide an example to deter others from similar conduct as are permissible in a court of law (*id.*, at p. 13); and the availability of such damages is governed by Civil Code section 3294. (*Id.*, at p. 13.) In *D.F.E.H. v. Fresno Hilton Hotel* (1984) F.E.H.C. Dec. No. 84–03, app. pending [ ], the Commission held that under section 12970, subdivision (a), it could award both compensatory (*id.*, at pp. 34–36) and punitive (*id.*, at pp. 36–40) damages. The Commission declared: "The purpose of awarding punitive damages is to punish or [ ] make an example of respondent, when it [has] engaged in, condoned, or ratified conduct ****1349** which is oppressive, fraudulent or malicious. (Civ.Code, § 3294)" (*Id.*, at p. 37; see also *D.F.E.H. v. Donald Schriver, Inc.* (1984) F.E.H.C. Dec. No. 84–07, app. pending, declaring the Commission is authorized to award punitive damages (*id.*, at [p.] 18) [ ] follow[ing] the judicial standard set forth in Civil Code section 3294 (*id.*, at pp. 18–22).)

Since the Commission first interpreted section 12970, subdivision (a) in 1980, the Legislature has amended the FEHA on numerous occasions without addressing the language in dispute regarding the Commission's authority to award appropriate effective relief. "[W]here the Legislature has failed to modify the statute so as to require an interpretation contrary to the regulation, that fact may be considered to be an indication that the ruling was consistent with the Legislature's intent." (*Action Trailer Sales, Inc. v. State Bd. of Equalization* (1975) 54 Cal.App.3d 125, 133–13[4] [126 Cal.Rptr. 339]; see also *Coca–Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 922 [156 P.2d 1].)

***1418** Dyna–Med relies upon a bill introduced but not enacted by the Legislature in 1976 (Assem. Bill No. 3124), (2 Assem. Final Hist. (1975–1976 Reg.Sess.) p. 1658) which would have expressly authorized the Commission to award damages in employment discrimination cases in an amount not *****93** to exceed $500.[17] [Dyna–Med's] reliance on proposed, but unpassed legislation is misplaced. (*National Elevator Services, Inc. v. Department of Industrial Relations* (1982) 136 Cal.App.3d 131, 141 [186 Cal.Rptr. 165]; *Miles v. Workers' Comp. Appeals Bd.* (1977) 67 Cal.App.3d 243, 248, fn. 4 [136 Cal.Rptr. 508]; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 58 [69 Cal.Rptr. 480]; see *United States v. Wise* (1962) 370 U.S. 405, 411 [82 S.Ct. 1354, 1358, 8 L.Ed.2d 590, 594–595].)

Dyna–Med next argues the express authorization in section 12987, subdivision (2) for the Commission to award actual and punitive damages up to $1,000 in housing discrimination cases and the omission of a similar provision in the employment discrimination provisions of the FEHA, suggests the Legislature did not intend punitive damages be available to remedy discriminatory employment practices. It further notes this distinction exists between the federal fair housing and fair employment statutes causing the courts to hold a specific punitive damage provision in the former implies punitive damages are not available under the employment provisions. (See tit. VIII of the Civil Rights Act, 42 U.S.C. § 3612(c), relating to fair housing which specifically permits recovery up to $1,000 in punitive damages in comparison to the absence of any corresponding authorization for punitive damages in tit. VII; see, e.g., *Richerson v. Jones, supra,* 551 F.2d 918, 927–928.) Accordingly, it contends that had the Legislature intended to empower the Commission to award punitive damages, it would have [ ] so [provided as] it had [ ] in parallel legislation. Again, [I am] unpersuaded.

In 1959, when the FEPA was enacted, the Legislature also enacted the Hawkins Act (former Health & Saf. Code, § 35700 et seq., enacted by Stats.1959, ch. 1681, § 1, p.

4074), prohibiting housing discrimination [in publicly assisted housing], and the Unruh Civil Rights Act (enacted by Stats.1959, ch. 1866, §§ 1–4, p. 4424; Civ.Code, § 51 et seq.), prohibiting discrimination in business establishments. In 1963, the Hawkins Act was replaced by the Rumford Fair Housing Act (former Health & Saf. Code, § 35700 et seq., enacted by Stats.1963, ch. 1853, §§ 1–2, p. 3823). The Hawkins Act originally permitted complainants to sue for the award of damages of not *1419 less than $500. (Former Health & Saf. Code, § 35730.) **1350 However, in 1963 when the Hawkins Act was replaced by the Rumford Act (Stats.1963, ch. 1853, § 2, p. 3823 et seq.), the Commission was empowered to order a violator to pay damages (not exceeding $500) if the Commission determined certain other delineated remedies were not available (*id.*, at pp. 3828–3829). In 1975, the maximum damage award was increased to $1,000. (Stats.1975, ch. 280, § 1, p. 701.) In 1977, the Commission was authorized to order such action by a violator as deemed appropriate to serve the law, including, but not limited to the sale or rental of the same or similar housing, the provision of nondiscriminatory purchase, rental and financing terms, and "[t]he payment of actual and punitive damages" not exceeding $1,000 (Stats.1977, ch. 1187, § 10, p. 3893; ch. 1188, § 13.1, pp. 3905–3906). Essentially, this statutory scheme was then carried into the FEHA when the employment and housing statutory schemes were combined.

As the foregoing history illustrates, although both the housing and employment discrimination statutes are now contained within a single act, the FEHA, they followed different legislative routes of treatment resulting in totally separate, original enactments. The Legislature has consistently placed limitations on remedies available in the housing context while at the ***94 same time granting the Commission broad discretion to fashion appropriate awards in the employment context. Consequently, because the limitation on recovery within the housing context in section 12987, subdivision (2) expressly notes punitive damages only to limit the availability of such damages, the absence of any express reference to such damages in section 12970, subdivision (a) within the employment context should not be construed as a lack of authority, but rather a lack of statutory limitation on such damages.

Further, [this] construction of the FEHA coincides with public policy. The public commitment to eliminate discrimination as explicitly set forth in section 12920 and characterized as a civil right in section 12921, is constitutionally guaranteed by article I, section 8 of the California Constitution. Section 8 provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." "The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness." (*Sail'er Inn [, Inc.] v. Kirby* (1971) 5 Cal.3d 1, 17 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351].)

Dyna-Med next contends the absence of procedural safeguards existing within the judicial system requires a conclusion punitive damages not be available in administrative proceedings. [I] recognize there may be differences in general procedure, rules of evidence, discovery, etc. However, the Commission is expressly permitted to award punitive damages in housingdiscrimination *1420 cases. Moreover, both the Administrative Procedure Act (APA) (§ 11500 et seq.) and Code of Civil Procedure section 1094.5 provide procedural protections to insure due process concerns are satisfied. [ ] ([See] *American National Ins. Co. v. Fair Employment & Housing Com., supra,* 32 Cal.3d 603, 607 [186 Cal.Rptr. 345, 651 P.2d 1151] [substantial evidence review by superior court]; [see also] *State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal.3d 422, 433 [217 Cal.Rptr. 16, 703 P.2d 354], and *Kerrigan v. Fair Employment Practice Com.* (1979) 91 Cal.App.3d 43, 51 [154 Cal.Rptr. 29] [ ] [independent judgment review] [ ].) In any event, "[Commission] hearings are always full evidentiary proceedings governed by the California rules of evidence and conducted in accordance with the California Administrative Procedure Act. (§§ 11500 et seq., 12972.) A record is preserved to facilitate judicial review, and the [Commission] is required to issue a decision setting forth findings of fact and conclusions of law in every contested case. (§§ 11517, subd. (b), 11518.) Cross-examination is, of course, permitted...." (*State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal.3d 422, 433 [217 Cal.Rptr. 16, 703 P.2d 354].)

Finally, Dyna-Med direly predicts giving the Commission authority to award punitive **1351 damages will open a Pandora's Box concerning the authority of administrative agencies generally to award punitive damages. However, although many administrative agencies are governed by the APA, it is the FEHA, not the APA, which gives the Commission the authority to order "such action ... as, in the judgment of the commission [,] will effectuate the purposes" of the FEHA (§ 12970, subd. (a)). If the Legislature gives an agency responsibility to protect the public and authorizes it to take the appropriate steps necessary to carry out the purposes of an act it enforces, then such an agency should be authorized to determine

claims for punitive damages. Whether other administrative agencies have, or will be given, such authorization can only be determined upon a review of those agencies own statutory authority, a review not necessary to this appeal.

Parallel Citations

43 Cal.3d 1379, 743 P.2d 1323, 46 Fair Empl.Prac.Cas. (BNA) 1143, 44 Empl. Prac. Dec. P 37,503

Footnotes

1 All further statutory references are to the Government Code unless otherwise indicated.

2 The majority in *Commodore Home* assumed for purposes of argument that punitive damages are not available from the commission. (32 Cal.3d at p. 218, fn. 7, 185 Cal.Rptr. 270, 649 P.2d 912.) Justice Richardson, dissenting, joined by Justice Kaus, expressly concluded that the FEHA does not allow the commission to award exemplary damages. (32 Cal.3d at p. 228, 185 Cal.Rptr. 270, 649 P.2d 912.)

3 Retaliation for filing a complaint was also prohibited by the FEPA. (Former Lab. Code, § 1420, subd. (e); see now Gov. Code, § 12940, subd. (f).)

4 The department did not initially ask for punitive damages, but did so only after the administrative law judge's proposed decision, whereupon the commission granted the department leave to amend its accusation to include a prayer for exemplary damages and ordered that the matter be reopened for the taking of additional evidence and argument on the issue. (See §§ 11516, 11517, subd. (c).) Following the supplemental hearing, the administrative law judge (ALJ) denied the department's request on grounds that to impose liability on Dyna-Med for exemplary damages would be "fundamentally unfair" and in violation of its right to due process of law in that the amended accusation seeking such damages was based in part on evidence given by Dyna-Med in defense of the original accusation, at which time Dyna-Med had no notice of a possible later charge "in aggravation and substantially enhanced liability, without legal precedent."

In reversing the ALJ, the commission stated that the ALJ found that Dyna-Med's conduct "was sufficiently egregious to support an award" of such damages. The record, however, shows that the ALJ found *only* that the department had "adduced evidence" in support of its allegations that Dyna-Med's violations were particularly "deliberate, egregious or inexcusable" so as to support the award of such damages.

5 The court stated that awards of back pay are frequently insignificant because interim earnings are deducted or offset; the value of reinstatement may be negligible because by the time employment discrimination cases are resolved, the plaintiff has had to find another job; and upgrading, back pay and reinstatement in cases of retaliation, as here, may not be effective deterrents or satisfactory remedies because the original work environment may no longer be conducive to the complainant's continued employment.

6 Amici appearing in support of Dyna-Med are the Chamber of Commerce of the United States, the California Chamber of Commerce, the Merchants and Manufacturers Association, the County of Madera, and Friendly Ford Peugeot. Arguments advanced by Dyna-Med and its supporting amici will hereafter be referred to as Dyna-Med's arguments.

7 Amici appearing in support of the commission are the Employment Law Center of the Legal Aid Society of San Francisco and Equal Rights Advocates, Inc. Arguments advanced by the commission and its supporting amici will hereafter be referred to as Commission's arguments.

8 Olander did not seek reinstatement at Dyna-Med. See also footnote 5, ante.

9 In 1980 the commission promulgated a regulation which provided: "While normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious or inexcusable." (Former Cal.Admin.Code, tit. 2, § 7286.9(c), Cal.Admin. Notice Register, tit. 2, Register 80, No. 25–A—6–21–80; see also D.F.E.H. v. Ambylou Enterprises, Inc. (1982) FEHC No. 82–06 [CEB precedential decisions 1982–1982, CEB 3].) This regulation was applied in the instant case. Although the regulation was repealed in 1985 (Cal.Admin. Notice Register, tit. 2, Register 85, No. 20—5–16–85), the commission continues to award exemplary as well as compensatory damages.

Neither the regulation nor the precedential decisions stating the commission's authority to award punitive damages was in effect at the time of Olander's discharge.

10 The Court of Appeal reached just this conclusion. According to the Court of Appeal: "If the Legislature gives an agency responsibility to protect the public and authorizes it to take the appropriate steps necessary to carry out the purposes of an act it enforces, then such an agency should be authorized to determine claims for punitive damages."

11 For example, in a recent age and race discrimination case involving the termination of a Black attorney, the negotiated settlement agreement provided for a year's severance pay and a special retirement plan, plus the company's informing all its supervisors that harassment is illegal and contrary to company policy. (*Arco Settles With Former Employee,* The Recorder (Mar. 10, 1987) p. 2, col. 4.)

12 " '[T]he doctrine of *ejusdem generis* ... states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.' " (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 331, fn. 10, 158 Cal.Rptr. 370, 599 P.2d 676, quoting *Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 819, 100 Cal.Rptr. 501.)

13 *Expressio unius est exclusio alterius* means that "the expression of certain things in a statute necessarily involves exclusion of other things not expressed...." (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403, 135 Cal.Rptr. 266.)

14 Under the rule of *noscitur a sociis,* " 'the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.' " (*People v. Stout* (1971) 18 Cal.App.3d 172, 177, 95 Cal.Rptr. 593, quoting *Vilardo v. County of Sacramento* (1942) 54 Cal.App.2d 413, 420, 129 P.2d 165.)

15 We observe that the standard initially adopted by the commission and applied in this case—authorizing the award of punitive damages in cases of violations that are "particularly deliberate, egregious or inexcusable" (see fn. 9, ante)—was not in conformity with the statutory standard.

16 The Hawkins Act permitted complainants to sue for both equitable relief and damages in an amount of not less than $500. (Stats.1959, ch. 1681, § 1, at p. 4076.) The Civil Rights Act authorized the award of actual damages, plus punitive damages in the amount of $250. (Stats.1959, ch. 1866, § 2, p. 4424.)

17 The Rumford Act initially empowered the commission's predecessor, the Fair Employment Practices Commission (FEPC), if it determined that certain make-whole remedies were not available, to award damages in an amount not to exceed $500. (Stats.1963, ch. 1853, § 2, pp. 3828–3829.) In 1975 the maximum damage award was increased to $1,000. (Stats.1975, ch. 280, § 1, p. 701.) In 1977 the act was amended to authorize the FEPC to order payment of "actual and punitive" damages not exceeding $1,000. The 1977 amendment also for the first time described the FEPC's authority to require remedial action in housing discrimination cases as "including, but not limited to" the actions specified. (Stats.1977, ch. 1187, § 10, p. 3893; ch. 1188, § 13.1, pp. 3905–3906.) In 1981 the statute was rewritten to remove the limit on the amount of compensatory damages, while retaining a $1,000 limit, adjusted for inflation, on punitive damages. (§ 12987, subd. (2), Stats.1981, ch. 899, § 3, p. 3424.)

18 As indicated, section 12987, as amended 1981, provides for the payment of punitive damages not to exceed $1,000, adjusted annually for inflation, and the payment of actual damages. Before its amendment, the section provided for the payment of actual and punitive damages not to exceed $1,000. (See fn. 17, ante.)

19 During the 1981–1982 legislative session, the Legislature twice declined to enact statutes (Sen. Bill No. 516; Assem. Bill No. 879) which, in part, would have prohibited the commission from awarding punitive damages. (See Sen. Final Hist. (1981–1982 Reg.Sess.) p. 339; 1 Assem. Final Hist. (1981–1982 Reg.Sess.) p. 647.)

20 Subdivision (e), enacted 1984, provides in relevant part: "If the board finds that discrimination has occurred ... the board shall issue ... an order requiring the appointing authority to cause the discrimination to cease and desist and to take such action, *including, but not limited to,* hiring, reinstatement or upgrading of employees, with or without back pay, *and compensatory damages,* which, in the judgment of the board, will effectuate the purposes of this part. Consistent with this authority, the board may establish rules governing the award of compensatory damages." (Emphasis added.)

Subdivision (a) of section 19702 was amended at the same time to provide that "discrimination" includes harassment and that this provision "is declaratory of existing law." (Stats.1984, ch. 1754, § 6, p. 1173.)

21 Section 12987 provides in pertinent part that in housing discrimination cases the commission shall issue an order requiring the respondent to "cease and desist from such [discriminatory] practice and to take such actions, as, in the judgment of the commission, will effectuate the purpose of this part, *including, but not limited to,* any of the following: [¶] (1) The sale or rental of the housing accommodation ... or ... of a like housing accommodation, ... or the provision of financial assistance, ... [¶] (2) *The payment of punitive damages in an amount not to exceed one thousand dollars ($1,000),* adjusted annually in accordance with the Consumer Price Index, *and the payment of actual damages.* [¶] (3) Affirmative or prospective relief."

22 A 1947 amendment to the NLRA separated the prosecuting and adjudicating functions within the NLRB. (NLRA, § 3(d), 29 U.S.C.A. § 153(d); *Haleston Drug Stores v. National Labor Relations Bd.* (9th Cir.1951) 187 F.2d 418, 421.) In 1977 the FEPA was amended to achieve a comparable separation within the department and to establish the private right of action when the department fails to act. (Stats.1977, ch. 1188, §§ 18–37, pp. 3906–3912.)

23 The 1967 amendment authorized the Division of Fair Employment Practices to engage in "affirmative actions" with employers, employment agencies, and labor organizations, and defined "affirmative actions" as any educational activity for the purpose of securing greater employment opportunities for members of racial, religious, or nationality minority groups and any promotional activity designed to the same end on a voluntary basis. The amendment further provided that it should not be construed to promote employment on a preferential or quota basis. (Stats.1967, ch. 1506, §§ 1–5, pp. 3574–3575.)

24 Section 8(a)(3) and (4) of the NLRA (29 U.S.C.A. § 158(a)(3) and (4)) makes it an unfair labor practice to discriminate against employees for union membership or charges filed under the NLRA. Section 10(a) (29 U.S.C.A. § 160(a)) authorizes the NLRB to prevent unfair labor practices. (See generally *Labor Board v. Jones & Laughlin,* supra, 301 U.S. at pp. 30, 32, 57 S.Ct. at pp. 621, 622.)

25 Because our disposition rests on statutory interpretation, we need not now address whether the power to award unlimited punitive damages could be lodged in an administrative tribunal and we express no opinion concerning the validity of legislation seeking to grant such authority.

1 Brackets together, in this manner [ ] *without enclosing material,* are used to indicate deletions from the opinion of the Court of Appeal; brackets *enclosing material* (other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks, which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. Footnotes in the Court of Appeal opinion have been renumbered sequentially.

2 Future referrals to Dyna-Med's arguments in this opinion also include those of amic[i].

3 Generally, "[t]he purpose of the FEHA is to provide effective remedies for the vindication of constitutionally recognized civil rights, and to eliminate discriminatory practices on the basis of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex and age. (See §§ 12920, 12921; Cal. Const., art. I, § 8.)" (*State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 432 [217 Cal.Rptr. 16, 703 P.2d 354].)

4 However, the court in *Commodore Home Systems, Inc. v. Superior Court, supra,* noted: "Declarations by the Director and the general counsel of the Department advise that right-to-sue letters are the rule, not the exception, because the Department rarely is able to complete investigations, pursue conciliation, and issue accusations within the 150–day period. For that reason, a right-to-sue letter is issued, even in advance of 150 days, to any person who states in writing that he wants to withdraw his complaint and file a civil action. We express no opinion on the propriety of that practice...." (32 Cal.3d at p. 218, fn. 8, [217 Cal.Rptr. 16, 703 P.2d 354].)

5 In 1980, the Commission adopted a regulation providing that "[w]hile normal monetary relief shall include relief in the nature of back pay, reasonable exemplary or compensatory damages may be awarded in situations involving violations which are particularly deliberate, egregious or inexcusable." (Cal.Admin.Code, tit. 2, § 7286.9, subd. (c).) The Commission clarified the meaning of this regulation in its precedential decision, *D.F.E.H. v. Ambylou Enterprises* (1982) F.E.H.C. Dec. No. 82–06 at pages 8, 9–17, where it adopted the standards normally applied by the courts in assessing exemplary and compensatory damages. It was, however, repealed on May 16, 1985 (effective 30th day thereafter, Cal.Admin. Register 85, No. 20) to eliminate the articulated "incorrect" legal standard for awarding exemplary or compensatory damages. The repeal was not intended to affect the Commission's authority to award such relief in appropriate cases as derived from the FEHA. (Cal.Admin.Code, tit. 2, § 7286.9, Cal.Admin.Code Supp., Register 85, No. 20, p. 134.)

6 " '[T]he doctrine of *ejusdem generis* ... states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage.' " (*Sears[,] Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 331, fn. 10 [158 Cal.Rptr. 370, 599 P.2d 676], quoting *Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 819 [100 Cal.Rptr. 501].)

7 *Expressio unius est exclusio alterius* means that "the expression of certain things in a statute necessarily involves exclusion of other things not expressed...." (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266].)

8 Under the rule of *noscitur a sociis,* " 'the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.' " (*People v. Stout* (1971) 18 Cal.App.3d 172, 177 [95 Cal.Rptr. 593], quoting *Vilardo v. County of Sacramento* (1942) 54 Cal.App.2d 413, 420 [129 P.2d 165].)

9 In *Edison* the Supreme Court stated: "That section [29 U.S.C. § 160(c)] authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' [ ] We think that this authority to order affirmative action does not go so far as to confer punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board [ ] be of the opinion that the policies of the Act might be effectuated by such an order.

"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." (305 U.S. 197, 235–236 [59 S.Ct. 206, 219–220, 83 L.Ed. 126, 143]; *Commodore Home Systems, Inc. v. Superior Court, supra,* 32 Cal.3d 211, 224 [185 Cal.Rptr. 270, 649 P.2d 912] (dis. opn.).)

10 The Attorney General notes the apparent reason for this change was to distinguish the "action" which the Commission could order from the narrow definition of "affirmative actions" as educational and promotional activities which was added to FEHA's predecessor statute in 1967. (See former Lab. Code, § 1413, subd. (g), added by § 5 of Stats.1967, ch. 1506, § 1, at p. 3573.) This construction is also proffered by Dyna-Med and amicus MMA. Because [I] do not rely on that legislative modification, [I] do not comment on the correctness of that assertion.

11 "The authority of courts to grant relief in actions brought under the Equal Employment Opportunity Act of 1972 is governed by the same statutory provision which applies in actions under Title VII of the Civil Rights Act of 1964 [()42 U.S.C. § 2000e–5 (g). [)] [Fn. omitted.] [That section] authorizes courts to order 'such affirmative action as may be necessary' to remedy unlawful employment practices." (*Richerson v. Jones* (3d Cir.1977) 551 F.2d 918, 923.)

12 [I am] aware the majority in *Commodore Home Systems, Inc. v. Superior Court, supra,* 32 Cal.3d 211, 217 [185 Cal.Rptr. 270, 649 P.2d 912] when determining that the FEHA does not limit the relief a court may grant in a statutory suit charging employment discrimination and that all relief generally available in noncontractual actions, including punitive damages may be obtained in such a civil action under the FEHA, noted differences between the NLRA as well as section 706(g) of title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e–5(g)) which diminish the weight of federal precedent interpreting the federal statutes as not authorizing awards of either general compensatory or punitive damages. However, because [I] believe the [distinctions] in *Commodore* rested substantially on the precise context of the issue the court was reviewing (i.e., the separate and distinct route to resolution of claims through private court action, and not administrative relief), [I] do not rely on [them] here.

13 While comparing the NLRA with title VII, the court in *Claiborne v. Illinois Central Railroad, supra,* 401 F.Supp. 1022, 1024–1025, aptly explained: "Moreover, the aim of the N.L.R.A. was to establish a framework within which management and labor could resolve their conflicts, whether by collective bargaining or economic warfare, *e.g.,* strikes and lock-outs. The N.L.R.A. was not meant to be outcome determinative, *i.e.,* it was not to ensure that management or labor wins every conflict. It simply defined permissible methods of engaging in industrial conflict and sought to channel labor/management conflict into peaceful negotiations. Title VII is radically different. It seeks to end all employment discrimination. It does not define permissible methods of discrimination nor does it establish a framework allowing for employment discrimination. Its aim is to be outcome determinative and to see that employees who are discriminated against win every conflict.

"Punitive damages under the N.L.R.A. are inappropriate because they would only serve to exacerbate conflict between management and labor within the permissible sphere of industrial conflict, *i.e.,* strikes and lock-outs. The

party assessed punitive damages could seek revenge in the next strike or be recalcitrant at the bargaining table. This would undermine the spirit of cooperation that is necessary for good-faith collective bargaining and the peaceful resolution of industrial conflicts. Such revenge seeking would be almost impossible to prove unless the party accused of it stated this was a reason for its action. Punitive damages might also create a sense of moral superiority in the side receiving them, discouraging that side from negotiating and avoiding strikes because it felt it was 'right.' Furthermore, punitive damages might permit the N.L.R.B. to destroy the equality of power between management and labor that Congress intended to create by the N.L.R.A. [(] Note, Tort Remedies for Employment Discrimination Under Title VII, 54 Va.L.Rev. 491, 502 (1968). [)]

"No such dangers exist under Title VII. Employment discrimination is not negotiable so there is no negotiating process to undermine. Where there is employment discrimination, there is no equality of power to be maintained, since employment discrimination is absolutely prohibited. Finally, there is no permissible area of conflict where revenge for punitive damages might be sought. Indeed, the possibility of punitive damages under Title VII should encourage an end to employment discrimination [...]. Accordingly, the profoundly different aims of Title VII and the N.L.R.A. should lead to a different, not similar, decision on punitive damages."

Upon reviewing the *Claiborne* court's decision, the Fifth Circuit stated: "Without approving or disapproving the lower court's resolution of the Title VII issue, its discussion of Title VII and the different purposes of the Civil Rights Act as compared to the [NLRA] ... is fully persuasive that an award of punitive damages does not so conflict with the purpose embodied in Title VII that it should be disallowed in a combined [Title VII and 42 U.S.C. § 1981] suit." (*Claiborne v. Illinois Cent. R.R.* (5th Cir.1978) 583 F.2d 143, 154.)

14 Amicus MMA contends the title VII cases are not distinguishable here because of the inclusion of the term "equitable" in the remedies section of the statute, citing the remedy language contained in the Federal Age Discrimination [in] Employment Act (ADEA) (29 U.S.C. § 621 et seq.). 29 United States Code section 626(b) pertinently provides: "In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section...."

MMA notes that every circuit court which has considered the issue of whether the ADEA permits the disposition of punitive and pain and suffering damages has held in the negative. (See *Slatin v. Stanford Research Institute* (4th Cir.1979) 590 F.2d 1292; *Vazquez v. Eastern Air Lines, Inc.* (1st Cir.1978) 579 F.2d 107; *Dean v. American Sec. Ins. Co.* (5th Cir.1977) 559 F.2d 1036; *Rogers v. Exxon Research & Engineering Co.* (3d Cir.1977) 550 F.2d 834; *Naton v. Bank of California* (9th Cir.1981) 649 F.2d 691.) In deciding pain and suffering or punitive damages are not necessary to effectuate the purposes of the ADEA, the *Dean* and *Rogers v. Exxon* cases rely heavily on the provision for liquidated damages in cases of willful violations of the ADEA. (*Rogers v. Exxon, supra,* at p. 840; *Dean v. American Sec. Ins. Co., supra,* at p. 1039.) After reviewing the legislative history, *Dean* states the sponsor of the bill "held the view that [ ] liquidated damages could effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve. [Fn. omitted.]" (*Id.,* at p. 1040.) There is no analogous provision specifying the type of damages that can be awarded in cases of willful violations in the FEHA, and thus we do not find the ADEA cases controlling. I note that although three of the courts (*Rogers, supra,* at [p. 841]; *Naton, supra,* at p. 699, and *Slatin, supra,* at p. 1296) expressed concern that pain and suffering damages would negatively impact the conciliation process, the court in *Vazquez, supra,* 579 F.2d 107, expressly rejected the proposition, concluding that a contrary result might be so logically reached (i.e., the employer might be less likely to compromise a claim if he knows no pain and suffering damages can be awarded against him). (*Id.,* at p. 111.)

15 The question whether the Commission can award compensatory and punitive damages was expressly reserved[.] [ ] (*Commodore Home Systems, Inc. v. Superior Court, supra,* 32 Cal.3d 211 [215, 220, 185 Cal.Rptr. 270, 649 P.2d 912]; *State Personnel Bd. v. Fair Employment & Housing Com., supra,* 39 Cal.3d 422, 429, 434, fn. 12 [217 Cal.Rptr. 16, 703 P.2d 354].)

16 The depth of the impact of the possibility of disparity in available remedies is far greater than initially meets the eye with regard to the indigent or less sophisticated claimants who cannot mount or sustain a lengthy civil action. Those individuals will be denied an opportunity to obtain an award of punitive damages solely because of their economic or social circumstances. Not only is this distinction among claimants irrelevant, but it is contrary to the Legislature's intent to eliminate employment discrimination, and violates the basic principles of equal protection. Unfortunately, economic status is often strongly correlated to race, sex, and various other forms of discrimination prohibited by the FEHA. If such victims of employment discrimination, often unemployed at the time they seek relief, cannot obtain full relief through the administrative proceedings made available to them, then in essence the FEHA will foster discrimination rather than eliminate it as judicial relief to this class is not economically feasible. The Legislature intended to create an expeditious, complete, administrative remedy, not an inferior mode of relief occasionally available to the unfortunate.

17 The Legislature attempted in 1983–1984 to amend section 12970, subdivision (a) to specifically authorize compensatory and punitive damages as "declaratory of existing law" in Senate Bill No. 2012; however, this language was removed before its enactment. (Stats.1984, ch. 1754, § 3, p. 6406.)

During the 1981–1982 legislative session, the Legislature twice declined to enact statutes which would have prohibited the Commission from awarding punitive damages in Senate Bill No. 516 and Assembly Bill No. 879.

End of Document

EXHIBIT 7

Austin v. Board of Retirement

Court of Appeal, Second District, Division 3, California. | May 2, 1989 | 209 Cal.App.3d 1528 | 258 Cal.Rptr. 106

Austin v. Board of Retirement

Court of Appeal, Second District, Division 3, California. | May 2, 1989 | 209 Cal.App.3d 1528 | 258 Cal.Rptr. 106

Document Details

KeyCite:	**KeyCite Yellow Flag - Negative Treatment** Disagreed With by Flethez v. San Bernardino County Employees Retirement Association, Cal.App. 4 Dist., April 22, 2015
Standard Citation:	Austin v. Bd. of Ret., 209 Cal. App. 3d 1528, 258 Cal. Rptr. 106 (Ct. App. 1989)
Parallel Citations:	258 Cal.Rptr. 106

Search Details

Jurisdiction:	California

Delivery Details

Date:	June 17, 2015 at 1:53 PM
Delivered By:	John Jensen
Client ID:	REGULATION CHALLENGE
Status Icons:	

Outline

West Headnotes
Attorneys and Law Firms
Opinion
Parallel Citations

209 Cal.App.3d 1528
Court of Appeal, Second District, Division 3, California.

Jason AUSTIN, Plaintiff and Respondent,
v.
BOARD OF RETIREMENT OF THE COUNTY OF LOS ANGELES EMPLOYEES' RETIREMENT ASSOCIATION, Defendant and Appellant.

No. B036645. | May 2, 1989. | Review Denied July 13, 1989.

Following determination by the Board of Retirement that 36–year-old county deputy sheriff was not eligible for service-connected disability retirement benefits, deputy sheriff filed petition for writ of mandate. The Superior Court, Los Angeles County, Edward Y. Kakita, J., issued writ, requiring grant of retroactive benefits and prejudgment interest and Board appealed. The Court of Appeal, Danielson, Acting P.J., held that: (1) deputy sheriff was entitled to prejudgment interest, and (2) deputy sheriff was not entitled to award of attorney's fees beyond award provided by statute governing retirement allowances.

Affirmed.

West Headnotes (3)

[1] **Appeal and Error**
Damages or Amount of Recovery

30Appeal and Error
30XVIReview
30XVI(A)Scope, Standards, and Extent, in General
30k838Questions Considered
30k842Review Dependent on Whether Questions Are of Law or of Fact
30k842(11)Damages or Amount of Recovery

Question of whether retired deputy sheriff was entitled to prejudgment interest from his last day of service on retroactive portion of award of retirement benefits was one of law, concerning which appellate court was required to exercise its independent judgment on review.

9 Cases that cite this headnote

[2] **Interest**
Particular Cases and Issues

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.20)Particular Cases and Issues

Thirty-six-year-old deputy sheriff who was awarded service connected disability retirement benefits was entitled to prejudgment interest on award of retroactive retirement benefits from date upon which he became entitled to benefits through date upon which he was granted them; Board of Retirement, which denied deputy's request for benefits, was not precluded from awarding benefits until administrative appeal process was completed.

9 Cases that cite this headnote

[3] **Costs**
Nature and Form of Judgment, Action, or Proceedings for Review

102Costs
102XOn Appeal or Error
102k259Damages and Penalties for Frivolous Appeal and Delay
102k260Right and Grounds
102k260(5)Nature and Form of Judgment, Action, or Proceedings for Review

Disabled deputy sheriff who prevailed in his attempt to obtain service-connected disability retirement benefits and prejudgment interest on award could not obtain award of attorney's fees beyond award provided in statutory scheme governing retirement allowance; deputy sheriff's motive in defending appeal was his economic self-interest rather than to advance significant public benefit. West's Ann.Cal.Gov.Code §

31536.

13 Cases that cite this headnote

Attorneys and Law Firms

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Lewis, Marenstein & Kadar and Thomas J. Wicke, Los Angeles, for plaintiff and respondent.

Opinion

DANIELSON, Acting Presiding Justice.

The Board of Retirement of the County of Los Angeles Employees' Retirement Association ("Board") appeals from the judgment granting a writ of mandate compelling the Board to award service-connected disability retirement benefits ("retirement benefits") to Jason L. Austin. (Code Civ.Proc., § 1094.5) The sole issue presented on appeal is whether Austin is entitled to interest on the award of retroactive retirement benefits from the date he became entitled thereto to the date upon which he was granted such benefits. We determine Austin was entitled to the award of interest, and affirm the judgment.

*1531 FACTS

Austin, a thirty-six year old Los Angeles County Deputy Sheriff with twelve years of service, applied for retirement benefits on June 11, 1985, alleging a low back injury suffered while lifting a wooden cabinet at the Los Angeles County Jail, and allergies, resulting in permanent disability. (Gov.Code, § 31720 et seq.) His application was denied by the Board, and he pursued an administrative appeal. Following an evidentiary hearing conducted before a referee on October 21, 1986, the referee recommended that the Board deny Austin retirement benefits on the ground that he was not disabled. On April 29, 1987, the Board adopted the referee's findings and reaffirmed its previous decision finding that Austin was not disabled.

Austin filed a petition writ of mandate in the superior court, challenging the Board's decision. On April 18, 1988, judgment was entered granting the petition; on April 21, 1988, the writ issued as ordered, commanding the Board to set aside its decision denying Austin retirement benefits, grant him such benefits retroactive to his last day of service with interest at the legal rate assessed on the amount of the pension that was retroactive, and pay his attorney fees in the amount of $2,500.00.

The Board complied with the writ insofar as it was directed to grant Austin retirement benefits and pay his attorney fees; the appeal from the judgment is directed to that portion awarding Austin interest on the award of retroactive benefits.

CONTENTIONS

The Board contends Austin is not entitled to prejudgment interest on retirement benefits retroactive to his last day of service, as the Legislature did not provide in the Retirement Act of 1937 for interest during the administrative process, and the Board was prevented by law from awarding retirement benefits prior to its decision following the referee's hearing.

DISCUSSION

[1] The question whether Austin is entitled to interest from his last day of service on the retroactive portion of his award of retirement benefits is one of law, concerning which we exercise our independent judgment. (*Estate of Madison* (1945) 26 Cal.2d 453, 456, 159 P.2d 630.)

Pertinent to our discussion is subdivision (a) of Civil Code section 3287: "Every person who is entitled to recover damages certain, or capable of *1532 being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state."

"Amounts recoverable as wrongfully withheld payments

of salary or pensions are damages within the meaning of these provisions. [Citations.] Interest is recoverable on each salary or pension payment from the date it fell due. [Citation.]" (*Olson* ****108** *v. Cory* (1983) 35 Cal.3d 390, 402, 197 Cal.Rptr. 843, 673 P.2d 720.)

The Board argues that had the Legislature intended to provide for the recovery of interest on disability pension payments due an applicant prior to the date upon which the Board denied such benefits, i.e., prior to completion of the administrative process, it would have so provided in the statutes establishing a comprehensive scheme for the determination and payment of disability retirement benefits. (Gov.Code, §§ 31720 et seq.) Such a provision would be redundant, as the Legislature provided elsewhere, and generally, in Civil Code section 3287 (*supra*), for the recovery of interest from a debtor, including "any county," on an award of damages certain, or capable of being made certain, the right to recover which is vested in the claimant on a particular day.

As the court stated in *Tripp v. Swoap* (1976) 17 Cal.3d 671, 131 Cal.Rptr. 789, 552 P.2d 749, with regard to the statutes relating to benefits under the former aid to the needy disabled program (former Welf. & Inst.Code, §§ 13500–13801), "Where as here two codes are to be construed, they 'must be regarded as blending into each other and forming a single statute.' [Citation.] Accordingly, they 'must be read together and so construed as to give effect, when possible, to all the provisions thereof.' [Citation.]" (17 Cal.3d at p. 679, 131 Cal.Rptr. 789, 552 P.2d 749.) In *Tripp,* former Welfare & Institutions Code section 10962 permitted an applicant or recipient of welfare benefits to seek judicial review of an adverse determination by the Director of the State Department of Social Welfare, and to do so without paying a filing fee. The section also authorized recovery of attorney's fees and costs by a successful recipient. The court stated, at page 679, 131 Cal.Rptr. 789, 552 P.2d 749: "Appellate courts have construed section 10962 in part as having as its purpose to ensure that aggrieved recipients have access to the judicial system to establish their statutory rights. [Citations.]" The *Tripp* court explained that the Legislature's inclusion of the provisions concerning filing fees, attorney's fees, and costs "supports the ***1533** view that the purpose of section 10962 is to ensure access to judicial review, rather than to define the extent of a recipient's recovery. Interest, on the other hand, relates to the extent of recovery inasmuch as it constitutes an element of damages. Under this construction the fact that the Legislature did not mention interest specifically does not mean that a successful recipient is precluded from receiving it." (*Tripp v. Swoap, supra,* 17 Cal.3d at pp. 680–681, 131 Cal.Rptr. 789, 552 P.2d 749; fn. omitted.) The court went on to hold that interest was recoverable pursuant to subdivision (a) of Civil Code section 3287.

[2] Similarly, in the present case, there is nothing in the statutory scheme governing disability pension benefits suggesting a legislative intent to preclude recovery of interest on damages awarded as prejudgment benefits from the date such benefits became due.

The Board argues the Legislature provided a remedy in lieu of interest for delays in the administrative process by enacting Government Code section 31725.7, which provides: "If a final determination is not made upon an application for disability retirement within 90 days after it is filed with the Board, the member may, *if eligible,* apply for, and the Board in its discretion may grant, a service retirement allowance pending the determination of his entitlement to disability retirement." (Emphasis added.) The argument is meritless. Many, many persons may be eligible for disability retirement benefits without also having reached the age and/or years of service requisite to eligibility for service retirement benefits. In the present case Austin, at age 36 with twelve years of service, would not become eligible for service retirement benefits for several years. (Gov.Code, §§ 31662.2, 31676.1, 31664.) Government Code section 31725.7 does not reflect an intent on the part of the Legislature to provide a remedy in lieu of that provided by Civil Code section 3287, subdivision (a).

Finally, the Board contends *Tripp* does not apply, as the Board was prevented by law from awarding benefits until the administrative ****109** appeal process was completed. Interestingly, in *Mass v. Board of Education* (1964) 61 Cal.2d 612, 39 Cal.Rptr. 739, 394 P.2d 579, the Board of Education employed a similar argument based on another aspect of Civil Code section 3287, subdivision (a), claiming interest accrued only from the date when the board bore the legal duty to reinstate a suspended teacher because until that time the " 'right to recover' did not 'vest' in him (Civ.Code, § 3287) and until then he was legally suspended." (*Id.,* at p. 625, 39 Cal.Rptr. 739, 394 P.2d 579.) The court stated: "The Civil Code requires vesting, however, only in order to fix with sufficient certainty the time when the obligation accrues so that interest should not be awarded on an amount before it is due. Each salary payment in the instant case accrued on a date certain. Unless the suspension itself can be sustained ***1534** and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued. If plaintiff had not been wrongfully suspended, he would have obtained the benefits of the moneys paid as of those dates; he has thus lost the natural

growth and productivity of the withheld salary in the form of interest." (*Ibid.*)

The Board's argument in the present case, logically concluded, would preclude awards of interest pursuant to Civil Code section 3287 in all cases wherein governmental entities denied persons benefits to which they were entitled, contrary to the specific language of the section providing that it is "applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state." If Austin had not been wrongfully denied disability retirement benefits, he would have obtained the benefits of the moneys paid as of the date of accrual of each payment. As the court stated in *Tripp:* "The same public policy that favors the award of retroactive benefits, would appear to favor the award of prejudgment interest on such benefit." (*Tripp v. Swoap, supra,* 17 Cal.3d 671, 683, 131 Cal.Rptr. 789, 552 P.2d 749.)[1]

Austin requests that we remand the matter to the superior court to determine whether he is entitled to an award of attorney fees pursuant to Code of Civil Procedure section 1021.5.[2] The Board does not address the issue.

Section 1021.5 "authorizes a court to compel the losing party to pay attorney fees to a prevailing party when all four of the following criteria are met. First, it must be an 'action which has resulted in the enforcement of an important right affecting the public interest....' Secondly, 'a significant benefit, whether pecuniary or non-pecuniary,' must have 'been conferred on the general public or a large class of persons, ...' Thirdly, 'the necessity and financial burden of private enforcement' must be 'such as to make the ***1535** award appropriate, ...' and fourthly, 'such fees should not in the interest of justice be paid out of the recovery, if any.' (Code Civ.Proc., § 1021.5.)" (*Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 6, 232 Cal.Rptr. 697.)

Generally, "[t]he decision as to whether an award of attorney fees is warranted under section 1021.5 rests initially with the trial court. [Citations.]" (*Los Angeles Police Protective League v. City of Los Angeles* ****110** (1985) 163 Cal.App.3d 1141, 1149, 209 Cal.Rptr. 890.) This is so "because at least some of the criteria outlined in section 1021.5 entail factual determinations an appellate court is in no position to undertake." (*Los Angeles Police Protective League v. City of Los Angeles, supra,* 188 Cal.App.3d 1, 7, 232 Cal.Rptr. 697.)

However, in the present case, where the only question is whether Austin is entitled to his attorney fees on appeal pursuant to section 1021.5, we hold that as a matter of law he cannot meet the third criterion for such an award. "The private attorney general theory recognizes citizens frequently have common interests of significant societal importance, but which do not involve any individual's financial interests to the extent necessary to encourage private litigation to enforce the right. [Citation.] To encourage such suits, attorneys fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action. [Citation.] Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest. [Citations.]" (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 114, 212 Cal.Rptr. 485.)

[3] Here, Austin sought by his action to enforce his individual right to interest on an award of retroactive retirement benefits. The statutory scheme governing retirement allowances provides for an award of reasonable attorney fees upon a successful appeal to the superior court from the Board's denial of an application for benefits (Gov.Code, § 31536, *supra,* fn. 2), and Austin was awarded fees in the amount $2,500.00. His motive in defending the appeal was his economic self-interest. (Cf. *Baggett v. Gates* (1982) 32 Cal.3d 128, 143, 185 Cal.Rptr. 232, 649 P.2d 874.) "Section 1021.5's policy of encouraging public interest lawsuits is not promoted by awarding fees to persons having strong personal economic interests in litigating matters. [Citation.]" (*Beach Colony II v. California Coastal Com., supra,* 166 Cal.App.3d at p. 115, 212 Cal.Rptr. 485.)

***1536 DECISION**

The judgment is affirmed.

ARABIAN and CROSKEY, JJ., concur.

Parallel Citations

209 Cal.App.3d 1528

Footnotes

1 The Board points to a footnote in *Tripp* wherein the court stated it was not deciding whether welfare recipients who were successful after an administrative appeal, rather than after judicial review, were entitled to interest on retroactive awards. (*Tripp v. Swoap, supra,* 17 Cal.3d 671, 685, fn. 14, 131 Cal.Rptr. 789, 552 P.2d 749.) We are unable to perceive the relevance of this note to the case before us, which involves prejudgment interest to which Austin is clearly entitled under Civil Code section 3287 and the decision in *Tripp*.

2 The award of attorney fees made by the trial court was authorized by Government Code section 31536: "If a superior court reverses the denial by the board of an application for retirement allowance ..., the superior court in its discretion may award reasonable attorney's fees as costs to the member ... who successfully appealed the denial of such application. Such costs shall be assessed against the board, shall be considered a cost of administration, and shall in no event become a personal liability of any member of the board."

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EXHIBIT 8

Aguilar v. Unemployment Ins. Appeals Bd.
Court of Appeal, Fourth District, Division 1, California. | August 28, 1990 | 223 Cal.App.3d 239 | 272 Cal.Rptr. 696

Aguilar v. Unemployment Ins. Appeals Bd.

Court of Appeal, Fourth District, Division 1, California. | August 28, 1990 | 223 Cal.App.3d 239 | 272 Cal.Rptr. 696

Document Details

Standard Citation:	Aguilar v. Unemployment Ins. Appeals Bd., 223 Cal. App. 3d 239, 272 Cal. Rptr. 696 (Ct. App. 1990)
Parallel Citations:	272 Cal.Rptr. 696

Outline

West Headnotes
Attorneys and Law Firms
Opinion
Parallel Citations

Search Details

Jurisdiction:	California

Delivery Details

Date:	June 17, 2015 at 2:13 PM
Delivered By:	John Jensen
Client ID:	REGULATION CHALLENGE
Status Icons:	

223 Cal.App.3d 239
Court of Appeal, Fourth District, Division 1, California.

Jose AGUILAR et al., Petitioners and Respondents,
v.
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, Respondent.
EMPLOYMENT DEVELOPMENT DEPARTMENT Real Party in Interest and Appellant.

No. D010304. | Aug. 28, 1990. | Review Denied Nov. 15, 1990.

After California Employment Development Department (EDD) was found obligated to pay unemployment benefits to group of farm workers it had denied benefits to on grounds workers were involved in trade dispute and therefore ineligible for unemployment benefits, workers appealed refusal to pay interest on amounts owed. The California Unemployment Insurance Appeals Board found no authority for payment of interest, and workers petitioned for peremptory writ of mandate. The Superior Court, Imperial County, No. 66445, William E. Lehnhardt, J., granted the writ and directed EDD to pay interest on benefits which had been withheld. EDD appealed. The Court of Appeal, Benke, J., held that: (1) Federal Unemployment Tax Act section requiring that all money withdrawn from unemployment fund of state be used solely in payment of unemployment compensation did not preclude payment of interest to claimants on withheld benefits, and (2) interest was owed under statute providing for recovery of interest by person entitled to recover damages capable of being made certain by calculation.

Affirmed.

West Headnotes (5)

[1] **States**
Interest

360States
360VClaims Against State
360k171Interest

Claimant's right to interest on award of benefits under governmental program depends upon whether there is any statute from which legislative determination that interest is not available can be inferred and, in absence of such a legislative determination, whether requirements of statute generally providing for interest for person entitled to recover damages capable of being made certain by calculation have been satisfied. West's Ann.Cal.Civ.Code § 3287(a).

4 Cases that cite this headnote

[2] **Unemployment Compensation**
Payment of Benefits

392TUnemployment Compensation
392TXVIIPayment of Benefits
392Tk590In General
(Formerly 356Ak721)

Federal Unemployment Tax Act section requiring that all money withdrawn from unemployment fund of state be used in payment of unemployment compensation did not preclude state from paying interest on unemployment benefits found to be due claimants; interest would constitute part of the compensation due claimants. 26 U.S.C.A. § 3304(a)(4).

3 Cases that cite this headnote

[3] **Unemployment Compensation**
Payment of Benefits

392TUnemployment Compensation
392TXVIIPayment of Benefits
392Tk590In General
(Formerly 356Ak721)

Employment Development Department would be required to pay interest on unemployment benefits the Department erroneously refused to pay on grounds claimant farm workers were involved in trade dispute and therefore ineligible

for unemployment benefits; the benefits were monetary obligation capable of being made certain, and claimant workers' right to benefits vested on particular days. West's Ann.Cal.Civ.Code § 3287(a).

3 Cases that cite this headnote

[4] **Mandamus**
Payment of Debts and Claims

250Mandamus
250IISubjects and Purposes of Relief
250II(B)Acts and Proceedings of Public Officers and Boards and Municipalities
250k104Payment of Debts and Claims
250k105In General

Unemployment benefits are monetary obligation which can be enforced by claimant in mandamus proceeding.

Cases that cite this headnote

[5] **Unemployment Compensation**
Determination in General

392TUnemployment Compensation
392TIXJudicial Review
392Tk494Determination in General
(Formerly 356Ak677.1, 356Ak677)

Superior court had authority to order Employment Development Department to pay interest on unemployment benefits erroneously refused to group of claimant workers, even if administrative law judge were confined to power set forth in Unemployment Insurance Code and did not have authority to award interest. West's Ann.Cal.Civ.Code § 3287(a).

2 Cases that cite this headnote

Attorneys and Law Firms

****697 *240** John K. Van de Kamp, Atty. Gen., Charlton G. Holland, Asst. Atty. Gen., Anne S. Pressman and John Venegas, Deputy Attys. Gen., for real party in interest and appellant.

Robert K. Miller and M. Carmen Ramirez, for petitioners and respondents.

No appearance for respondent California Unemployment Ins. Appeals Bd.

INTRODUCTION

BENKE, Associate Justice.

In this case we hold the California Employment Development Department (EDD) must pay interest on unemployment benefits it erroneously refused to pay to a group of farmworkers. The benefits were a monetary obligation capable of being made certain and the workers' right to the benefits vested on particular days. Under ****698** *Tripp v. Swoap* (1976) 17 Cal.3d 671, 682, 131 Cal.Rptr. 789, 552 P.2d 749 (*Tripp v. Swoap*), those are the only conditions which must exist to recover interest in a mandamus action against the state. Accordingly we affirm the judgment of the trial court granting the workers a writ of mandate directing payment of interest on the benefits withheld by EDD.

FACTUAL BACKGROUND

The facts in this case are undisputed. Petitioners and respondents are a group of farmworkers who applied for unemployment benefits in 1978. ***241** EDD denied the benefits on the grounds the workers were involved in a trade dispute and were therefore ineligible for unemployment benefits. EDD's determination was upheld by an administrative law judge, the California Unemployment Insurance Appeals Board (CUIAB) and in a superior court proceeding. However in 1985 the Court of Appeal for the First District reversed and remanded to the superior court to determine whether 81 of the claimants were eligible under *Campos v. Employment Development Dept.* (1982) 132 Cal.App.3d 961, 183 Cal.Rptr. 637 (*Campos*).[1] The superior court in turn remanded to the CUIAB. In 1987 an administrative law judge found 28 of the 81 workers were entitled to benefits under *Campos*. EDD paid the unemployment benefits to

the 28 workers but refused to pay any interest on the amounts owed.

The 28 workers appealed the EDD's interest determination to the CUIAB. An administrative law judge agreed with the workers and ordered EDD to pay interest on the amounts owed. Thereafter the CUIAB found no authority for payment of interest in the Unemployment Insurance Code and reversed the administrative law judge's ruling.

The 28 workers then filed a petition for a peremptory writ of mandate in the superior court. The superior court granted the writ and directed EDD to pay interest on the benefits which had been withheld. EDD filed a timely notice of appeal.

ISSUE ON APPEAL

The only issue EDD raises on appeal is its contention interest is not payable on unemployment benefits. We disagree and affirm.

DISCUSSION

In *Tripp v. Swoap, supra,* 17 Cal.3d 671, 131 Cal.Rptr. 789, 552 P.2d 749, the plaintiff's application for welfare benefits was improperly denied. In a mandamus proceeding the superior court ordered payment of benefits from the time of application and awarded the plaintiff prejudgment interest. The Director of the former Department of Social Welfare appealed and the Supreme Court affirmed.

In upholding the interest award, the Supreme Court noted that in providing for judicial review of benefit determinations the Legislature expressly ***242** provided, in Welfare and Institutions Code section 10962, for a waiver of filing fees and authorized payment of attorney fees and costs to successful recipients. However the Legislature made no provision for payment of interest. The Supreme Court held the Legislature's failure to expressly provide for interest did not prevent a recipient from receiving interest under Civil Code section 3287 subdivision (a).[2] "In the absence ****699** of the specific provisions in [Welf. & Inst.Code] section 10962 relating to filing fees, attorney's fees, and costs, a needy person unable to bear the cost of bringing suit might be foreclosed from vindicating rights which have been conferred upon him by statute. The Legislature's inclusion of these provisions thus supports the view that the purpose of section 10962 is to ensure access to judicial review, rather than to define the extent of a recipient's recovery. *Interest, on the other hand, relates to the extent of recovery inasmuch as it constitutes an element of damages.* Under this construction the fact that the Legislature did not mention interest specifically does not mean that a successful recipient is precluded from receiving it. Rather, we must determine whether there is some other authority on which it should be awarded." (*Tripp v. Swoap, supra,* 17 Cal.3d at pp. 680–681, 131 Cal.Rptr. 789, 552 P.2d 749, fn. omitted, italics added.)

Finding no bar to interest the court turned its attention to Civil Code section 3287, subdivision (a). "Civil Code section 3287, subdivision (a), ... authorizes the recovery of interest on damages which are certain or capable of being made certain by calculation, where the right to recover has vested on a particular day. In *Mass v. Board of Education* [1964] 61 Cal.2d 612 [39 Cal.Rptr. 739, 394 P.2d 579], we construed this statute as providing for prejudgment interest in actions based upon a general underlying monetary obligation, including the obligation of a governmental entity determined by way of mandamus. Since *Mass* our courts on numerous occasions have awarded prejudgment interest in mandamus proceedings brought to recover sums of money pursuant to a statutory obligation. [Citations.]

"...

"Under section 3287, subdivision (a), as interpreted in *Mass, supra,* a claimant must satisfy three conditions for the recovery of interest in a mandamus action against the state: (1) There must be an underlying monetary obligation; (2) the recovery must be certain or capable of being made ***243** certain by calculation; and (3) the right to recovery must vest on a particular day." (*Tripp v. Swoap, supra,* 17 Cal.3d at pp. 681–682, 131 Cal.Rptr. 789, 552 P.2d 749, fn. omitted, italics added.)

Because welfare benefits are a monetary obligation of the state subject to determination by reference to fixed payment schedules and become due when an applicant has established eligibility, the court found they accrue interest under Civil Code section 3287. (*Tripp v. Swoap, supra,* 17 Cal.3d at pp. 682–683, 131 Cal.Rptr. 789, 552 P.2d 749.) Like *Mass,* the holding in *Tripp v. Swoap* has been relied upon in a number of contexts to support an award of interest.[3] (*Marine Terminals Corp. v. Paceco, Inc.* (1983) 145 Cal.App.3d 991, 995, 193 Cal.Rptr. 687 [repair costs]; *E.L. White, Inc. v. City of Huntington Beach* (1982) 138 Cal.App.3d 366, 377, 187 Cal.Rptr.

879 [indemnity for damages paid to tort victim]; *ITT Gilfillan, Inc. v. City of Los Angeles* (1982) 136 Cal.App.3d 581, 584–585, 185 Cal.Rptr. 848 [refund of business taxes]; *Todd Shipyards Corp. v. City of Los Angeles* (1982) 130 Cal.App.3d 222, 226–227, 181 Cal.Rptr. 652 [same]; *Levy–Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 796–797, 142 Cal.Rptr. 1 [tort action for damages to tangible property].)

Most recently in *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528, 1532–1534, 258 Cal.Rptr. 106 (*Austin*), another district of the Court of Appeal, relying on *Tripp v. Swoap,* found interest was payable ****700** on an award of disability retirement benefits. As in *Tripp v. Swoap,* the *Austin* court found "there is nothing in the statutory scheme governing disability pension benefits suggesting a legislative intent to preclude recovery of interest on damages awarded as prejudgment benefits from the date such benefits became due." (*Id.* at p. 1533, 258 Cal.Rptr. 106.)

The result reached in *Austin* is consistent with the views expressed by the Supreme Court in *Tripp v. Swoap* and *Olson v. Cory* (1983) 35 Cal.3d 390, 406, 197 Cal.Rptr. 843, 673 P.2d 720 (*Olson v. Cory*). In particular, although unmentioned by the parties, we note the following from the opinion in *Tripp v. Swoap:* "Of course, the operation of section 3287, subdivision (a), is further predicated on the existence of damages. Actions to recover retroactive salary increases and wrongfully withheld pension payments have been held to constitute actions for damages. [Citations.] *For purposes of* ***244** *section 3287, subdivision (a), we find wrongfully withheld welfare benefits analytically indistinguishable from salary increases and pension payments.* Accordingly, we are of the view that the action before us is an action for damages within the meaning of that statute. [Citation.]" (*Tripp v. Swoap, supra,* 17 Cal.3d at p. 682, fn. 12, 131 Cal.Rptr. 789, 552 P.2d 749, italics added.) Moreover in *Olson v. Cory,* the court stated: "Nothing in the wording of Civil Code section 3287 suggests that the right to recover interest from the state varies in accordance with the particular fund out of which the underlying obligation was payable." (*Id.* at p. 406, 197 Cal.Rptr. 843, 673 P.2d 720.)

The result in *Austin* and the Supreme Court's unwillingness to apply Civil Code section 3287 on the basis of the type of public debt incurred are important here because EDD's major argument on appeal is that unemployment benefits do not serve the same social purpose as welfare benefits. EDD argues welfare benefits grow out of a "humanitarian" concern for the basic needs of all members of society while unemployment insurance is a scheme directed toward "economic stability." EDD contends that given the differences between the two benefit programs, the payment of interest on welfare benefits required by *Tripp v. Swoap* has no bearing on whether interest is also payable on unemployment benefits.

[1] The distinction EDD has attempted to draw is unavailing. In light of *Austin,* the Supreme Court's own statement in *Tripp v. Swoap,* and the number of other contexts in which *Tripp v. Swoap* has been applied, it is plain any distinction in the goals of various governmental programs is entirely unrelated to the right to interest under Civil Code section 3287, subdivision (a). Rather, a claimant's right to interest depends upon whether there is any statute from which we can infer a legislative determination interest is not available and, in the absence of such a legislative determination, whether the requirements of section 3287, subdivision (a), have been satisfied. (See *Tripp v. Swoap, supra,* 17 Cal.3d at pp. 681–682, 131 Cal.Rptr. 789, 552 P.2d 749.)

[2] EDD concedes, as it must, that there is nothing in the Unemployment Insurance Code which prevents payment of interest on unemployment benefits. The only statutory impediment to payment of interest which EDD has suggested is 26 United States Code section 3304(a)(4), which is part of the Federal Unemployment Tax Act (FUTA). Although it did not raise the issue below, in a footnote in its brief to this court EDD asserts payment of interest is barred by FUTA because 26 United States Code section 3304(a)(4) requires that "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration...."

EDD has not cited, and we have not found, any cases which interpret this language as preventing the payment of interest on unemployment benefits. ***245** Rather, the analysis employed by the Supreme Court in *Tripp v. Swoap* in interpreting section 10962 of the Welfare and Institutions Code suggests no inconsistency between the payment of interest on benefits ****701** and FUTA. As we have seen in *Tripp v. Swoap,* the court found interest is not collateral to the amount due under a government benefits program but rather, as an element of damages, is related to the extent of recovery. (17 Cal.3d at p. 681, 131 Cal.Rptr. 789, 552 P.2d 749.) Thus under *Tripp v. Swoap* payment of interest would not be barred by 26 United States Code section 3304(a) because interest would be part of the compensation the state owes claimants.

We also note the considerable liberality which the states have been given by the federal government in defining the

benefits available under their own unemployment insurance systems. " 'The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States. The Federal Government, however, should assist the States in setting up their administrations and in the solution of the problems they will encounter.' ... 'The States should have freedom in determining their own waiting periods, benefit rates, maximum-benefit periods, etc.' " (*Ohio Bureau of Employment Services v. Hodory* (1977) 431 U.S. 471, 483, 97 S.Ct. 1898, 1905–1906, 52 L.Ed.2d 513, quoting Report of the Committee on Economic Security, as reprinted in Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1311, 1328 (1935); see also *New York Tel. Co. v. New York St. Dept. of Labor* (1979) 440 U.S. 519, 539, fn. 31, 99 S.Ct. 1328, 1340, fn. 31, 59 L.Ed.2d 553.)

In short then we reject EDD's reliance on FUTA. In calculating the compensation an unemployed person may receive we believe California is free to include interest on wrongfully denied claims.

[3] [4] Because there are no statutes which prevent payment of interest, we must next determine whether the requirements of Civil Code section 3287, subdivision (a), have been satisfied. First we note unemployment benefits are a monetary obligation which can be enforced by a claimant in a mandamus proceeding. (See *Thomas v. California Emp. Stab. Com.* (1952) 39 Cal.2d 501, 504–505, 247 P.2d 561, Unemp.Ins.Code, § 1326.) Secondly the amount to which a particular claimant is entitled, like the welfare benefits discussed in *Tripp v. Swoap,* can be calculated with certainty by reference to fixed schedules. (See Unemp. Ins. Code, §§ 1275, 1280.) Finally the right to payment of benefits vests when the claimant has established the facts which entitle him to the benefits. (*Tripp v. Swoap, supra,* 17 Cal.3d at p. 683, 131 Cal.Rptr. 789, 552 P.2d 749.) As the court explained in *Tripp v. Swoap:* "For purposes of awarding interest, each payment of benefits ... should be viewed as vesting on the ***246** date it becomes due." (*Ibid.*) Thus, like the welfare benefits discussed in *Tripp v. Swoap,* unemployment benefits accrue interest: they are monetary obligations which can be calculated with certainty as of particular dates.

[5] Because the claimants were entitled to interest on their benefits the superior court did not err in granting them a petition for writ of mandate.[4]

Judgment affirmed.

KREMER, P.J., and FROEHLICH, J., concur.

Parallel Citations

223 Cal.App.3d 239

Footnotes

1 In *Campos* a group of frozen food processors had been placed on a seasonal layoff subject to recall and were collecting unemployment benefits when their union went on strike against their employer. The employer then attempted to recall the laid-off workers. The workers refused to return to work and EDD terminated their benefits. The Court of Appeal held the termination of benefits was improper because of a provision in the Unemployment Insurance Code which allows a worker receiving benefits to refuse "new work" if the vacancy is due to a strike, lockout or other labor dispute. (*Campos, supra,* 132 Cal.App.3d at pp. 974–976, 183 Cal.Rptr. 637.)

2 Civil Code section 3287, subdivision (a), provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state."

3 In addition to upholding the award of interest the court in *Tripp v. Swoap* also reviewed the former Department of Social Welfare's eligibility determination. In doing so it applied the substantial evidence test. (17 Cal.3d at p. 676, 131 Cal.Rptr. 789, 552 P.2d 749.) In *Frink v. Prod* (1982) 31 Cal.3d 166, 180, 181 Cal.Rptr. 893, 643 P.2d 476, the court found that welfare eligibility determinations should be subject to independent judicial review and accordingly overruled that portion of *Tripp v. Swoap* which applied the substantial evidence test.

4 EDD also argues the administrative law judge had no power to award interest. EDD asserts the administrative law judge was confined to the powers set forth in the Unemployment Insurance Code. Although we do not necessarily accept the limitation EDD proposes, we note the EDD's appeal is from a superior court judgment directing the payment of interest. Plainly under *Tripp v. Swoap* the superior court was empowered to order the agency to pay interest.

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EXHIBIT 9

Goldfarb v. Civil Service Com.
Court of Appeal, First District, Division 4, California. | November 26, 1990 | 225 Cal.App.3d 633 | 275 Cal.Rptr. 284

Goldfarb v. Civil Service Com.

Court of Appeal, First District, Division 4, California. | November 26, 1990 | 225 Cal.App.3d 633 | 275 Cal.Rptr. 284

Document Details

KeyCite:	**KeyCite Yellow Flag - Negative Treatment** Distinguished by Weber v. Board of Retirement of Los Angeles County Retirement Ass'n, Cal.App. 2 Dist., April 10, 1998
Standard Citation:	Goldfarb v. Civil Serv. Com., 225 Cal. App. 3d 633, 275 Cal. Rptr. 284 (Ct. App. 1990)
Parallel Citations:	275 Cal.Rptr. 284

Search Details

Jurisdiction:	California

Delivery Details

Date:	June 17, 2015 at 1:47 PM
Delivered By:	John Jensen
Client ID:	REGULATION CHALLENGE
Status Icons:	

Outline

West Headnotes
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Opinion
Parallel Citations

225 Cal.App.3d 633
Court of Appeal, First District, Division 4, California.

Stephen GOLDFARB, Appellant,
v.
CIVIL SERVICE COMMISSION, Alameda County, Respondents.

No. A048507. | Nov. 26, 1990.

Clinical psychologist received back pay award from county and its civil service commission for wrongful demotion. Psychologist then petitioned for writ of mandate to require payment of interest on back pay award. The Superior Court, No. 655330–8, Alameda County, Michael Ballachey, J., denied petition, and psychologist appealed. The Court of Appeal, Perley, J., held that back pay award was damages under statute allowing recovery of damages and interest from any county, and psychologist was entitled to interest on each installment of back salary from date it fell due.

Reversed and remanded.

West Headnotes (3)

[1] **Mandamus**
Scope and Extent in General

250Mandamus
250IIIJurisdiction, Proceedings, and Relief
250k187Appeal and Error
250k187.9Review
250k187.9(1)Scope and Extent in General

Appellate court is not bound by trial court's decision to deny writ of mandate where facts are undisputed and decision to grant or deny writ is purely question of law.

2 Cases that cite this headnote

[2] **Mandamus**
Nature and Existence of Rights to Be Protected or Enforced
Mandamus
Nature of Acts to Be Commanded

250Mandamus
250INature and Grounds in General
250k10Nature and Existence of Rights to Be Protected or Enforced
250Mandamus
250INature and Grounds in General
250k12Nature of Acts to Be Commanded

Writ of mandamus may be issued where there is clear, present, and usually ministerial duty on part of defendant, and clear, present, and beneficial right in plaintiff to performance of that duty.

2 Cases that cite this headnote

[3] **Counties**
Particular Officers, Agents and Services

104Counties
104IIIOfficers and Agents
104k68Compensation
104k74Particular Officers, Agents and Services
104k74(1)In General

Back pay award obtained by clinical psychologist against county for wrongful demotion was "damages" under statute allowing recovery of damages and interest from any county, notwithstanding claims that back pay awarded by ordinance was not damages under statute, that interest was precluded because statutes regulating claims against counties did not provide for payment of interest, and that claims for back pay were not claims for money or damages within meaning of Tort Claims Act. West's Ann.Cal.Civ.Code § 3287; West's Ann.Cal.Gov.Code §§ 950 et seq., 29700 et seq.

5 Cases that cite this headnote

Attorneys and Law Firms

****285 *634** Priscilla Winslow, Winslow & Fassler, Oakland, for appellant.

Kevin H. Booty, Jr., County Counsel, Krisida Nishioka, Deputy County Counsel, Oakland, for respondents.

Opinion

PERLEY, Associate Justice.

Stephen Goldfarb appeals from an order denying his petition for writ of mandate to compel respondents Alameda County (County) and its Civil Service Commission (Commission) to pay him interest on back pay he received under a County ordinance after the Commission determined that he had been wrongfully demoted. Under Civil Code section 3287, subdivision (a),[1] counties are liable to pay interest on "damages." We conclude that appellant's back pay award was for "damages" within the meaning of this statute and therefore reverse.

FACTUAL BACKGROUND

Appellant challenged his demotion from Senior Clinical Psychologist to Clinical Psychologist at the County's Health Care Services Agency. After a civil service hearing, the Commission rescinded the demotion and restored ***635** appellant to his former position. He then received approximately $15,000 under a County ordinance that automatically awards back pay when the Commission retroactively rescinds a disciplinary action.[2] He petitioned the trial court for a peremptory writ of mandate after respondents rejected his demand for interest on the back pay.

DISCUSSION

[1] Preliminarily, we note that an appellate court is not bound by a trial court's decision to deny a writ of mandate where the facts are undisputed and the decision to grant or deny the writ is purely a question of law. (*Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407, 216 Cal.Rptr. 782, 703 P.2d 122; *Goddard v. South Bay Union High School Dist.* (1978) 79 Cal.App.3d 98, 105, 144 Cal.Rptr. 701.) There is no factual dispute in this instance and the sole issue presented—whether a civil servant is entitled to interest on a back pay award—is one of law. ****286** (*Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528, 1531, 258 Cal.Rptr. 106.) Therefore, we can independently determine whether respondents' decision constituted an abuse of discretion. (*Thelander v. City of El Monte* (1983) 147 Cal.App.3d 736, 748, 195 Cal.Rptr. 318; *Weary v. Civil Service Com.* (1983) 140 Cal.App.3d 189, 195, 189 Cal.Rptr. 442.)

[2] A writ of mandate may be issued where there is a clear, present and usually ministerial duty on the part of the defendant, and a clear, present and beneficial right in plaintiff to performance of that duty. (*California Teachers Assn. v. Governing Board* (1987) 195 Cal.App.3d 285, 295, 240 Cal.Rptr. 549.) These conditions are satisfied in appellant's case insofar as the petition seeks interest on his back pay.

[3] Respondents' duty to pay interest and appellant's right to such interest are established by section 3287, subdivision (a), which provides in pertinent part that "[e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day.... This section is applicable to recovery of damages and interest from ... any county...." The Civil Code defines "damages" broadly as monetary compensation for one who suffers detriment from the unlawful act or omission of another (§ 3281), and a number of cases have indicated that back pay awards are "damages" under section 3287.

In *Mass v. Board of Education* (1964) 61 Cal.2d 612, 39 Cal.Rptr. 739, 394 P.2d 579, a wrongfully suspended teacher was reinstated and awarded ***636** full salary from the date of suspension. Citing section 3287, the court found that the teacher was "entitled to prejudgment interest as an element of damages on each [lost] salary payment as it accrued." (*Id.* at p. 624, 39 Cal.Rptr. 739, 394 P.2d 579.) The court noted that section 3287 had been amended in 1959 "to include rights against local governmental agencies," and disapproved decisions suggesting that interest could not be recovered in mandamus actions. (*Id.* at pp. 624, 625–626, 39 Cal.Rptr. 739, 394 P.2d 579.) The court also noted that: "Each salary payment in the instant case accrued on a date certain. Unless the suspension itself can be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued. If plaintiff had not been wrongfully suspended, he would have obtained the benefit of the moneys paid as of those dates; he has thus lost the natural growth and

productivity of the withheld salary in the form of interest." (*Id.* at p. 625, 39 Cal.Rptr. 739, 394 P.2d 579.) Under this reasoning, appellant is entitled to interest on each installment of back salary from the date it fell due.

Subsequent decisions likewise hold that back pay awards are "damages" for purposes of section 3287. *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 262, 90 Cal.Rptr. 169, 475 P.2d 201, awarded prejudgment interest on overdue salary payments on the ground that "[a]n action to recover retroactive pay increases is an action for damages within the meaning of section 3287 of the Civil Code." *Olson v. Cory* (1983) 35 Cal.3d 390, 197 Cal.Rptr. 843, 673 P.2d 720, awarded interest on claims for back salary and pension payments. The court quoted section 3287, subdivision (a), and held that "[a]mounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of these provisions." (*Id.* at pp. 401–402, 197 Cal.Rptr. 843, 673 P.2d 720.)

These cases are controlling and respondents' attempts to distinguish them are unpersuasive. Respondents suggest that *Mass* is distinguishable because the plaintiff in that case sued in court for reinstatement and back pay as well as interest, whereas appellant here seeks only interest. We see no reason, however, why appellant should be denied interest on his back pay simply because he was vindicated in an administrative proceeding and did not have to contest his demotion in court. Respondents point out that the back pay in *Mass* was awarded pursuant to court order, whereas the back pay in this case was paid pursuant to a local ordinance. Again, however, we fail to see why back pay awarded ****287** by ordinance is any less in the nature of "damages" than back pay awarded by administrative or court order. If we were to rule that counties could avoid paying interest on wrongfully withheld salaries simply by enacting ordinances that made orders for payment of those salaries superfluous, then we would no doubt precipitate a flurry of such enactments.

***637** Respondents next argue that they are not responsible for interest on appellant's back pay because the statutes regulating claims against counties (Gov.Code, §§ 29700 et seq.) do not provide for payment of interest. A similar argument was recently rejected in *Austin v. Board of Retirement, supra.* The plaintiff in that case, a former county sheriff, prevailed on a claim for disability retirement benefits. The retirement board argued it was not liable for prejudgment interest because there was no provision for interest in the statutes governing payment of disability retirement benefits (Gov.Code, §§ 31720 et seq.). The *Austin* court found that such a provision "... would be redundant, as the Legislature provided elsewhere, and generally, in Civil Code section 3287 (*supra*), for the recovery of interest from a debtor, including 'any county.' " (*Austin v. Board of Retirement, supra,* 209 Cal.App.3d at p. 1532, 258 Cal.Rptr. 106.) This same reasoning applies in appellant's case.

Respondents rely finally on cases holding that claims for back pay are not claims for "money or damages" within the meaning of the Tort Claims Act (Gov.Code, § 950 et seq.). (See *Eureka Teacher's Assn. v. Board of Education* (1988) 202 Cal.App.3d 469, 247 Cal.Rptr. 790; *Harris v. State Personnel Bd.* (1985) 170 Cal.App.3d 639, 216 Cal.Rptr. 274.) These cases are inapposite. They do not address the meaning of "damages" in section 3287 and the Tort Claims Act is not at issue here.

We thus conclude that appellant's petition should be granted insofar as it seeks interest on the back pay he received. The trial court did not reach, and the parties have not briefed, the merits of the petition insofar as it requests attorneys' fees and costs under Government Code section 800 (arbitrary and capricious conduct by public entity), and we express no opinion on that issue.

DISPOSITION

The order denying the petition for writ of mandate is reversed. The case is remanded with directions to grant the petition insofar as it seeks interest on appellant's back pay, and for further proceedings on his request for attorneys' fees and costs. Appellant is entitled to costs on appeal.

ANDERSON, P.J., and REARDON, J., concur.

Parallel Citations

225 Cal.App.3d 633

Footnotes

1 Unless otherwise indicated, all further statutory references are to the Civil Code.

2 The record contains no citation to this ordinance. Our description of its operation is derived from respondents' answer to the petition for writ of mandate.

End of Document

EXHIBIT 10

American Federation of Labor v. Unemployment Ins. Appeals Bd.
Supreme Court of California. | August 29, 1996 | 13 Cal.4th 1017 | 920 P.2d 1314

American Federation of Labor v. Unemployment Ins. Appeals Bd.

Supreme Court of California. | August 29, 1996 | 13 Cal.4th 1017 | 920 P.2d 1314

Document Details

KeyCite:	**KeyCite Yellow Flag - Negative Treatment** Distinguished by Smith v. Rae-Venter Law Group, Cal., December 2, 2002
Standard Citation:	Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd., 13 Cal. 4th 1017, 920 P.2d 1314 (1996)
Parallel Citations:	920 P.2d 1314, 56 Cal.Rptr.2d 109, 96 Cal. Daily Op. Serv. 6499

Search Details

Jurisdiction:	California

Delivery Details

Date:	June 17, 2015 at 1:40 PM
Delivered By:	John Jensen
Client ID:	REGULATION CHALLENGE
Status Icons:	

Outline

West Headnotes
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Dissenting Opinion
Parallel Citations

13 Cal.4th 1017
Supreme Court of California.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, Plaintiff and Respondent,
v.
UNEMPLOYMENT INSURANCE APPEALS BOARD, Defendant and Appellant.

No. S049642. | Aug. 29, 1996. | Rehearing Denied Nov. 13, 1996.*

Claimant sought to "back date" her unemployment insurance claim to obtain benefits for an earlier period. The Employment Development Department (EDD) denied request, and claimant filed administrative appeal. Administrative law judge reversed decision of the EDD and ordered retroactive benefits for ten-week period between initial denial of eligibility and subsequent benefit award. Claimant then sought interest on the ten weeks of retroactive benefits. The Unemployment Insurance Appeals Board removed matter, and issued precedent benefit decision determining that no statutory authority existed for such an award of interest to a successful claimant. Federation and labor unions then brought suit for declaratory relief challenging Board's decision. The Superior Court, San Francisco County, No. 959239, Paul H. Alvarado, J., granted judgment in favor of federation, and Board appealed. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal. Thereafter, the Supreme Court, Chin, J., held that administrative law judges do not have statutory authority to award statutory interest on routine award of retroactive unemployment insurance benefit payments.

Reversed.

Opinion, 45 Cal.Rptr.2d 418, vacated.

Mosk and Kennard, JJ., filed dissenting opinions.

West Headnotes (5)

[1] **Interest**
Particular cases and issues
Unemployment Compensation
Conclusiveness and effect

219Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.20) Particular cases and issues
392T Unemployment Compensation
392TVIII Proceedings
392TVIII(B) Hearing
392Tk299 Determination and Order
392Tk301 Conclusiveness and effect
(Formerly 356Ak618.1)

Administrative law judges do not have authority to award statutory prejudgment interest on routine award of retroactive unemployment insurance benefit payments; pursuant to statute allowing parties to recover prejudgment interest in damage actions based on general underlying monetary obligation, only a court may award prejudgment interest on its judgment following a mandamus action to recover benefits that were wrongfully withheld by the Unemployment Insurance Appeals Board. West's Ann.Cal.Civ.Code § 3287(a); West's Ann.Cal.Un.Ins.Code § 100 et seq.

24 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Relief granted

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak489 Decision
15Ak495 Relief granted

Administrative law judges, like the agencies authorized to appoint them, may not act as superior court judges, and in excess of their statutory powers, award interest in administrative eligibility and benefit matters. West's Ann.Cal.Civ.Code § 3287(a).

6 Cases that cite this headnote

[3] **Interest**
Particular cases and issues

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.20)Particular cases and issues

Nothing in federal statute mandating that state's method of administering its unemployment insurance program must reasonably insure full payment of unemployment compensation "when due" requires state administrative law judges to award prejudgment interest in administrative hearings determining benefit eligibility for unemployment insurance compensation. Social Security Act, § 303(a)(1), 42 U.S.C.A. § 503(a)(1); West's Ann.Cal.Civ.Code § 3287(a).

14 Cases that cite this headnote

[4] **Administrative Law and Procedure**
Statutory basis and limitation
Administrative Law and Procedure
Implied powers

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A)In General
15Ak303Powers in General
15Ak305Statutory basis and limitation
15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A)In General
15Ak325Implied powers

Administrative agencies have only the powers conferred on them, either expressly or by implication, by Constitution or statute.

4 Cases that cite this headnote

[5] **Administrative Law and Procedure**
Powers in General

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A)In General
15Ak303Powers in General
15Ak303.1In general

Administrative agency must act within powers conferred upon it by law and may not act in excess of those powers; actions exceeding those powers are void, and administrative mandate will lie to nullify the void acts.

8 Cases that cite this headnote

Attorneys and Law Firms

***110 *1021 **1315** Daniel E. Lungren, Attorney General, and Asher Rubin, Deputy Attorney General, for Defendant and Appellant.

Altshuler, Berzon, Nussbaum, Berzon & Rubin, Stephen P. Berzon and Scott A. Kronland, San Francisco, for Plaintiff and Respondent.

Grant R. Specht, Robert K. Miller, Barbara Macri–Ortiz, Andrew Koenig, Ventura, M. Carmen Ramirez, Esta Mott and Cynthia L. Rice, Salinas, as Amici Curiae on behalf of Plaintiff and Respondent.

Opinion

***111** CHIN, Justice.

[1] We granted review to decide a narrow question of first impression: whether an administrative law judge may award interest on a payment of retroactive unemployment insurance benefits. Administrative law judges, acting on behalf of the Unemployment Insurance Appeals Board (the Board), sit by authority granted under Unemployment Insurance Code section 100 et ***1022** seq. The code limits these judges to reviewing the action of the Employment Development Department (EDD) in its ministerial determination of unemployment benefit eligibility. (Unemp.Ins.Code, § 1334.) Nowhere does the Unemployment Insurance Code grant the administrative law judges, or the Board, the ****1316** express authority to award interest on an administrative benefit award.

By contrast, pursuant to Civil Code section 3287, subdivision (a) (§ 3287(a)), courts have awarded prejudgment interest on a trial court judgment following a successful administrative mandamus action to recover *wrongfully withheld* benefits. (*Aguilar v. Unemployment Ins. Appeals Bd.* (1990) 223 Cal.App.3d 239, 246, 272 Cal.Rptr. 696 (*Aguilar*) [trial court properly ordered EDD to pay interest on unemployment benefits wrongfully withheld]; see *Tripp v. Swoap* (1976) 17 Cal.3d 671, 681–682, 131 Cal.Rptr. 789, 552 P.2d 749 (*Tripp*), overruled on other grounds in *Frink v. Prod* (1982) 31 Cal.3d 166, 180, 181 Cal.Rptr. 893, 643 P.2d 476.) Interest may be awarded in the mandamus action because the requirements for the additional award of interest are met once the court determines the Board wrongfully denied benefits. In order to recover section 3287(a) interest in the mandamus action, the claimant must show: (1) an underlying monetary obligation, (2) damages which are certain or capable of being made certain by calculation, and (3) a right to recovery that vests on a particular day. (*Aguilar, supra,* 223 Cal.App.3d at pp. 242–243, 272 Cal.Rptr. 696.) The rationale for the mandamus interest award is that a claimant who is wrongfully denied unemployment insurance benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board's denial. (Cf. *Tripp, supra,* 17 Cal.3d at p. 683, 131 Cal.Rptr. 789, 552 P.2d 749; see 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1397, pp. 868–869 [prejudgment interest compensates plaintiffs for delay in recovery of damages].)

Notwithstanding the Board's restricted powers, the Court of Appeal held that a claimant's successful attempt to "backdate" unemployment insurance benefits she was already receiving could entitle her to recover section 3287(a) prejudgment interest after the Board determined that she was eligible for the additional benefits. Relying on *Knight v. McMahon* (1994) 26 Cal.App.4th 747, 31 Cal.Rptr.2d 832 (*Knight*), the Court of Appeal awarded the interest as an additional benefit even though the Board had never wrongfully withheld benefits, the claimant had not met the requirements of section 3287(a), and the Board itself concluded it lacked the power to award interest as part of its benefit award.

We conclude the Court of Appeal erred. Neither the Unemployment Insurance Code nor section 3287(a) authorizes the Board, or administrative ***1023** law judges acting on behalf of the EDD, to award interest, either on the Board's administrative eligibility determination that retroactive unemployment insurance benefits are due, as in this case, or in any administrative proceeding where the enabling statute does not authorize an award of interest.

Moreover, contrary to the assertion of the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), we find no implied power allowing the Board to award interest at any time during the administrative review process. Under the administrative scheme of the Unemployment Insurance Code, the EDD has no underlying monetary obligation to the claimant until it determines the claimant is eligible for the benefits. (See Unemp. Ins.Code, §§ 100 et seq., 1251 [benefits are payable to eligible unemployed individuals].) Once eligibility has been determined, the right to receive benefits vests on the first day of the claimant's entitlement, and the EDD must promptly pay benefits due, regardless of any *****112** appeal taken. (Unemp.Ins.Code, §§ 1335, subd. (b), 1326.) Hence, a "wrongful withholding" of benefits, and the corresponding delay in receiving benefits, cannot have legal significance entitling the claimant to prejudgment interest until the Board makes its final decision that the claimant is not entitled to the benefits. Because there is no potential "wrongful withholding" of benefits if the Board determines the claimant is eligible for unemployment insurance benefits, there can be no grounds for filing a mandamus action under Code of Civil Procedure section 1094.5 challenging the Board's favorable decision, and no damages "capable of being made certain" that would give rise to even an implied obligation to award interest on ****1317** the benefits recovered during the administrative process. Accordingly, only a court may award section 3287(a) prejudgment interest on its judgment following a claimant's successful mandamus action challenging the Board's wrongful withholding of benefits. (Cf. *Tripp, supra,* 17 Cal.3d at p. 683, 131 Cal.Rptr. 789, 552 P.2d 749.)

[2] In so holding, we abide by the settled principle that administrative law judges, like the agencies authorized to appoint them, may not act as superior court judges, and in excess of their statutory powers, to award interest in administrative eligibility and benefit matters. (See *Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1389, 241 Cal.Rptr. 67, 743 P.2d 1323 (*Dyna–Med*) [administrative agency may not create remedy Legislature has withheld].) We therefore reverse the Court of Appeal judgment and disapprove *Knight, supra,* 26 Cal.App.4th 747, 31 Cal.Rptr.2d 832, to the extent it conflicts with our decision.

***1024 BACKGROUND**

1. *Unemployment Insurance Program*

California's unemployment insurance program, as promulgated by the Unemployment Insurance Code, is part of a national system of reserves designed to provide insurance for workers "unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." (Unemp.Ins.Code, § 100.) Under the Unemployment Insurance Code, the state participates in a cooperative unemployment insurance program with the federal government, codified as the Federal Unemployment Tax Act. (26 U.S.C. § 3301 et seq.; see Unemp. Ins.Code, § 101 [integration of state and national plans].) Although the federal government has in the past assisted the states in setting up their programs, it recognizes that " '[t]he plan for unemployment compensation that [it] suggest[s] contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish ..., [including the ability to determine] [¶] ... their own waiting periods, benefit rates, maximum-benefit periods, etc.' " (*Ohio Bureau of Employment Services v. Hodory* (1977) 431 U.S. 471, 483, 97 S.Ct. 1898, 1905–06, 52 L.Ed.2d 513, quoting Rep. of the Com. on Economic Security, as reprinted in Hearings Before the Sen. Com. on Finance on Sen. No. 1130, 74th Cong., 1st Sess., at pp. 1311, 1328 (1935).) The states must, however, administer their unemployment compensation programs in a manner that reasonably ensures full payment of benefits once the administrative agency determines those benefits are due. (42 U.S.C. § 503(a).)

In order to receive benefits, an unemployment insurance claimant applies to the EDD, a branch of the Health and Welfare Agency, which investigates the claim and makes an initial eligibility determination in a nonadversarial setting. (Unemp. Ins.Code, §§ 301, 1326 et seq.) The applicant for unemployment insurance benefits has the burden of establishing eligibility and, as a practical matter, the EDD's initial inquiry "is limited by the necessity for routine, ex parte determinations based upon such information as is reasonably available." (*Jacobs v. California Unemployment Ins. Appeals Bd.* (1972) 25 Cal.App.3d 1035, 1040, fn. 7, 102 Cal.Rptr. 364.) Unemployment Insurance Code section 1326 provides: "Claims for unemployment compensation benefits shall be made in accordance with authorized regulations of the director. Except as otherwise provided in this article, the department shall promptly pay benefits if it finds the claimant is eligible or shall promptly deny benefits if it finds the claimant is ineligible."

***113** If the EDD denies an application for benefits, a claimant may file an administrative appeal, which is heard by an administrative law judge. (Unemp.Ins.Code, §§ 1334, 1335, subd. (c); Cal.Code Regs., tit. 22, § 5100 et ***1025** seq.) Section 1334 states that "[a]n administrative law judge after affording a reasonable opportunity for fair hearing, shall, unless such appeal is withdrawn, affirm, reverse, modify, or set aside any determination" of eligibility. If the administrative law judge determines the claimant is eligible for benefits, the benefits must be "promptly paid," regardless of any appeal, "by the director, appeals board, or other administrative body ****1318** or by any court." (Unemp.Ins.Code, § 1335, subds.(a), (b).)[1]

If the administrative law judge denies eligibility on reconsideration, a claimant may, within 20 days of that decision, appeal to the Board, which may take additional evidence. "Not until the appeal to the referee and the ensuing appeal to the [Board] does allocation of the burden of proof become meaningful. (See Unemp. Ins.Code, §§ 1327, 1328, 1334.) At the appellate level the agency has the task of formulating findings which support its decision." (*Jacobs v. California Unemployment Ins. Appeals Bd., supra,* 25 Cal.App.3d at p. 1040, fn. 7, 102 Cal.Rptr. 364.) With certain exceptions not applicable here, the Board must affirm, reverse, modify, or set aside the administrative law judge's decision within 60 days after the submission of the appeal. (Unemp. Ins.Code, §§ 401 et seq., 1334, 1336, 1337.)

Pursuant to Unemployment Insurance Code section 413, subdivision (a)(2), the Board may also "remove" the claim to itself for review and decision if it is dissatisfied with the administrative law judge's decision. The Board may designate significant decisions as "precedent decisions," which are published for public reference. (Unemp.Ins.Code, § 409.) These decisions are binding on all administrative law judges. (Unemp. Ins.Code, § 409; see 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, §§ 347–354, pp. 338–344.)

If, after reviewing the EDD's benefit eligibility determination, the Board concludes the claimant is eligible for unemployment insurance compensation, the EDD must pay benefits owed regardless of any further action taken ***1026** by the director or any additional appeals filed. (Unemp.Ins.Code, § 1338.) At this point, the Board has no statutory authority to award interest on the benefits for any inherent delay in the bureaucratic process that occurred while the claimant pursued the administrative claim for benefits, and the Board has consistently acknowledged it lacks the express or implied authority to do so.

Thus, contrary to Justice Kennard's dissent, the Unemployment Insurance Code allows the EDD, and

unemployment insurance claimants, a reasonable time to process each legitimate claim. Benefits are not due immediately after a claim is filed following employment termination. Rather, they are due promptly only after a claimant has established benefit eligibility. (*California Human Resources Dept. v. Java, supra,* 402 U.S. at p. 133, 91 S.Ct. at p. 1355.) The statutory scheme thus accounts for the fact that delays are inherent in the entitlement claim review process and are necessary to ensure only those claimants who have established eligibility will receive benefits. Indeed, Justice Kennard's rigid calculation of the benefit due date shows a misreading of federal cases interpreting the prompt payment requirement. The "when due" language of 42 United States Code section 503(a)(1) means that ***114** compensation payments are required at the earliest administratively feasible stage of unemployment after giving both the employee and the employer opportunity to be heard. (*California Human Resources Dept. v. Java, supra,* 402 U.S. at p. 131, 91 S.Ct. at p. 1353–54; *Wilkinson, supra,* 627 F.2d at p. 661.) The emphasis of the federal legislation, as reflected in the promulgating regulations, is on "prompt and accurate" disposition of unemployment insurance claims, which necessarily depends on a balancing of these factors under the particular circumstances of each case. (*Wilkinson, supra,* 627 F.2d at p. 661.) The delays inherent in this system are not, **1319 however, tantamount to a "wrongful withholding" of benefits giving rise to a right to section 3287(a) prejudgment interest once the Board rules in favor of the claimant.

If the Board affirms the denial of eligibility, or on removal decides against the claimant, he or she may then seek a limited trial de novo in the superior court in an administrative mandate proceeding. (Code Civ. Proc., § 1094.5 [review of administrative orders].) During this review, a claimant is not limited to the record before the Board, and the trial court exercises its independent judgment on all the facts material to the claim, regardless of the record of proceedings before the Board. (*Laisne v. Cal. St. Bd. of Optometry* (1942) 19 Cal.2d 831, 834, 123 P.2d 457 (*Laisne*).) "[B]ecause the entire judicial power of the state is vested in certain enumerated courts by article III, section 1, and article VI, section 1, of the Constitution of this state," only *1027 a court, in contrast to the Board, has constitutional authority to make final determinations of fact, and indeed must exercise independent judgment on all material facts presented by the claimant. (*Laisne, supra,* 19 Cal.2d at p. 834, 123 P.2d 457.)

Once the court exercises its independent judgment and determines on mandamus that the Board has *wrongfully withheld* benefits, "a claimant has met all requirements of the act, and all contingencies have taken place under its terms, [the claimant] then has a statutory right to a fixed or definitely ascertainable sum of money. [Citations.]" (*Thomas v. California Emp. Stab. Com.* (1952) 39 Cal.2d 501, 504, 247 P.2d 561.) At this point, the claimant has met the requirements of section 3287(a), and may seek prejudgment interest on the mandamus judgment for the delay caused by the Board's wrongful denial of benefits. (See *Tripp, supra,* 17 Cal.3d at p. 681, 131 Cal.Rptr. 789, 552 P.2d 749.)

Those persons denied benefit eligibility are not the only ones allowed to challenge the Board's decision. Pursuant to Unemployment Insurance Code section 409.2, "[a]ny interested person or organization may bring an action for declaratory relief in the superior court ... to obtain a judicial declaration as to the validity of any precedent decision of the appeals board issued under Section 409 or 409.1." This provision is appropriate for the reason that "... precedent decisions are akin to agency rulemaking, because they announce how governing law will be applied in future cases. [Citation.]" (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 109, 172 Cal.Rptr. 194, 624 P.2d 244.) The Board's precedent decisions interpret applicable statutes and regulations, and "[t]heir correctness as precedent relates to law and policy, not to adjudicative fact. [Citation.]" (*Ibid.*) Courts will reject the Board's statutory construction when it is contrary to legislative intent. (*Id.* at p. 111, 172 Cal.Rptr. 194, 624 P.2d 244.) Nonetheless, in light of the Board's expertise, its interpretation of a statute it routinely enforces is entitled to great weight and will be accepted unless its application of legislative intent is clearly unauthorized or erroneous. (*Ibid.*) Moreover, "[c]ourts may not substitute their judgment for that of the agency on matters within the agency's discretion." (*Ibid.*)

If a third person pursues an action against the Board under Unemployment Insurance Code section 409.2, a declaratory judgment in favor of the third person "does not alter the rights of the original parties as determined by the [B]oard. The third person's concern with the decision as precedent provides no basis to disturb the actual award or denial of benefits in a particular case." (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd., supra,* 29 Cal.3d at p. 110, 172 Cal.Rptr. 194, 624 P.2d 244.) Thus, the modifications ***115** of a precedent *1028 benefit decision that follow a reversal of the Board's decision affect the declaratory judgment only and "may not alter the result between the parties." (*Id.* at p. 111, 172 Cal.Rptr. 194, 624 P.2d 244; see Unemp. Ins.Code, § 409.1 [Board must modify reversed decision to conform to judgment].)

2. *The Kalem Matter*

In the present matter, claimant Toni Z. Kalem sought to "backdate" her unemployment insurance claim to obtain benefits for an earlier period. The EDD denied Kalem's ****1320** request, and she filed an administrative appeal with the Board.

The administrative law judge hearing the appeal for the Board reversed the EDD's decision and ordered retroactive benefits for the 10–week period between the initial denial of eligibility for retroactive benefits and the subsequent benefit award. Kalem then sought interest from the Board on the 10 weeks of retroactive benefits. The Board, pursuant to Unemployment Insurance Code section 413, subdivision (a)(2), removed the matter to itself for review and decision, and then, under Unemployment Insurance Code section 409, issued a precedent benefit decision (*Matter of Toni Z. Kalem* (1993) Cal. Unemp. Ins.App. Bd. Precedent Benefit Dec. No. P–B–476). The Board determined that because it "may not exercise those judicial powers which are reserved to the courts," and is granted statutory authority to make benefit eligibility determinations only, neither the Board nor administrative law judges acting on its behalf have the authority to award section 3287(a) prejudgment interest to a successful claimant who is awarded benefits through the normal course of administrative review.[2]

AFL–CIO, acting as an "interested ... organization" pursuant to Unemployment Insurance Code section 409.2, filed a complaint for declaratory relief in superior court challenging the Board's precedent benefit decision that only a court has the authority to award prejudgment interest on its judgment reversing the Board's denial of benefit eligibility. (See generally, Code Civ. Proc., §§ 1060–1062.3 [provisions governing declaratory relief].) Exercising its independent judgment, the trial court granted AFL–CIO's motion for judgment on the pleadings, invalidating the Board's precedent benefit decision and concluding that administrative law judges have "the power and the duty" to award prejudgment interest on routine benefit payments. The trial court entered judgment in favor of AFL–CIO and ***1029** ordered the Board to modify its decision to conform to the judgment. (Unemp.Ins.Code, § 409.1.) The Board appealed.

The Court of Appeal affirmed the trial court judgment. It relied on *Knight,* which concluded that administrative law judges may award prejudgment interest on retroactive welfare benefit payments. (*Knight, supra,* 26 Cal.App.4th at pp. 755–756, 31 Cal.Rptr.2d 832.) The Court of Appeal concluded administrative law judges have the power to award interest on unemployment insurance benefits pursuant to section 3287(a) even though there has been no "wrongful withholding" of benefits because the claimant successfully recovered benefits in the normal course of administrative review. The court rejected the Board's assertion that, by awarding prejudgment interest, administrative law judges would be acting beyond their statutory authority and in contravention of the statutory scheme governing the unemployment insurance administrative process. The Court of Appeal distinguished our decisions in *Dyna–Med, supra,* 43 Cal.3d 1379, 241 Cal.Rptr. 67, 743 P.2d 1323, and *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 276 Cal.Rptr. 114, 801 P.2d 357 (*Peralta*), which held that administrative agencies may not make monetary awards beyond their statutory authority. In so doing, the Court of Appeal ignored the fact that section 3287(a) interest may only be awarded in a mandamus action following the Board's wrongful withholding of benefits. *****116** (*Aguilar, supra,* 223 Cal.App.3d at pp. 242–243, 272 Cal.Rptr. 696.) As we explain, the Court of Appeal's analysis fails to justify granting the Board an additional, and potentially costly, monetary power not granted by the Legislature. Accordingly, we conclude we must reverse the Court of Appeal's judgment.

In lieu of filing an opening brief in this court, the Board relies on briefs it submitted in the Court of Appeal, thus raising the identical arguments asserted in that court. (Cal. Rules of Court, rule 29.3(a).) We will address each of the Board's contentions and AFL–CIO's responses after reviewing the ****1321** development and application of section 3287(a).

DISCUSSION

1. *Section 3287(a)*

Section 3287(a), originally adopted in 1872, allows the award of prejudgment interest as an element of damages and states: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the

creditor from paying the debt. This section is applicable to recovery of damages and ***1030** interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state." (As amended by Stats.1955, ch. 1477, § 1, pp. 2689–2690; Stats.1959, ch. 1735, § 1, p. 4186; Stats.1967, ch. 1230, § 1, p. 2997.) There is scant pertinent legislative history, but the provision's meaning is clear. Section 3287(a) allows parties to recover prejudgment interest in damage actions based on a general underlying monetary obligation, including the obligation of a governmental entity determined by way of mandamus. (*Mass v. Board of Education* (1964) 61 Cal.2d 612, 624–627, 39 Cal.Rptr. 739, 394 P.2d 579 [wrongfully withheld backpay constitutes damages for purposes of section 3287(a)]; Civ.Code, § 3281 [damages are monetary compensation for one "who suffers detriment from the unlawful act or omission of another"].)

Our decision in *Tripp, supra,* 17 Cal.3d at pages 682–683, 131 Cal.Rptr. 789, 552 P.2d 749, held that wrongfully withheld welfare benefits eventually awarded in a mandamus action under the former aid to the needy disabled program (Welf. & Inst.Code, former § 13500 et seq.) amounted to a state monetary obligation that accrued prejudgment interest under section 3287(a). In *Tripp,* the plaintiff filed an administrative mandamus action for benefits after the defendant Director of the Department of Social Welfare denied eligibility on the ground her disability was not permanent. (*Tripp, supra,* 17 Cal.3d at p. 675, 131 Cal.Rptr. 789, 552 P.2d 749.) In that action, the trial court concluded the plaintiff's injuries were permanent and that there was no substantial evidence her condition would improve. (*Ibid.*) "The court entered judgment accordingly ordering the issuance of a peremptory writ of mandate directing defendant to set aside his decision of August 28, 1973, in the underlying administrative proceeding and to pay plaintiff benefits retroactively from July 25, 1972, with attorney's fees and interest at the legal rate." (*Tripp, supra,* 17 Cal.3d at pp. 675–676, 131 Cal.Rptr. 789, 552 P.2d 749.)

On appeal from the judgment, the director challenged the trial court's decision in our court. Writing for the majority, Justice Sullivan determined the trial court correctly applied the substantial evidence test in awarding plaintiff her retroactive benefits. (*Tripp, supra,* 17 Cal.3d at pp. 676–677, 131 Cal.Rptr. 789, 552 P.2d 749.) The court concluded the effective date of plaintiff's entitlement to benefits was "the first day of the month following the date of application." (*Id.* at p. 678, 131 Cal.Rptr. 789, 552 P.2d 749.) The court modified the judgment to reflect the proper date of commencement of benefits.

The *Tripp* court next turned to the question whether "the recipient of wrongfully denied welfare benefits is entitled to prejudgment interest," even though the trial court had denied the interest because the Legislature did not ***1031** provide for payment of interest following judicial review of benefit determinations. (*Tripp, supra,* 17 Cal.3d at p. 678, 131 Cal.Rptr. 789, 552 P.2d 749.) We *****117** allowed the interest award after observing: "... the fact that the Legislature did not specify interest is not probative on the issue whether it is recoverable under the view that the purpose of [Welfare and Institutions Code] section 10962 [providing for judicial review of administrative benefit decisions] is to ensure access to judicial review and not to define the extent of recovery. [Citation.]" (*Tripp, supra,* 17 Cal.3d at p. 684, 131 Cal.Rptr. 789, 552 P.2d 749.) The *Tripp* majority rejected the defendant's contention that the plaintiff was not entitled to interest because "... section 10962 makes judicial review ****1322** under Code of Civil Procedure section 1094.5 plaintiff's 'exclusive remedy' without specifically providing for interest." It concluded, "... inasmuch as an aggrieved party must proceed by way of administrative mandamus, the availability of interest as an element of damages remains open. (See Code Civ. Proc., § 1095.)" (*Tripp, supra,* 17 Cal.3d at p. 679, fn. 7, 131 Cal.Rptr. 789, 552 P.2d 749.) Recognizing that interest "relates to the extent of recovery inasmuch as it constitutes an element of damages," *Tripp* observed it must determine whether "some other authority" would allow the court to award interest on plaintiff's wrongfully denied benefits. (*Id.* at p. 681, 131 Cal.Rptr. 789, 552 P.2d 749.)

The *Tripp* majority concluded that section 3287(a) "authorizes the recovery of interest on damages which are certain or capable of being made certain by calculation, where the right to recover has vested on a particular day." (*Tripp, supra,* 17 Cal.3d at p. 681, 131 Cal.Rptr. 789, 552 P.2d 749.) The court observed that the right to benefit payment vests when the claimant has established the facts entitling him or her to the benefits. (*Id.* at p. 683, 131 Cal.Rptr. 789, 552 P.2d 749.) *Tripp* awarded the interest for the delay the Director of the State Department of Welfare caused by wrongfully withholding benefits after the hearing officer determined the claimant was entitled to them, "despite the absence of specific statutory authority" for the award under the welfare scheme. (*Id.* at p. 682, 131 Cal.Rptr. 789, 552 P.2d 749.) *Tripp* emphasized that the recovery of prejudgment interest under section 3287(a) required an action for damages, which included wrongfully denied benefits. (*Tripp, supra,* 17 Cal.3d at p. 682, fn. 12, 131 Cal.Rptr. 789, 552 P.2d 749.) Thus, *Tripp*

justified the court's interest award on the "policy rationale" that "... it may take long periods of time for an applicant to vindicate his entitlement to aid and in the interval the delay inevitably exacts its toll from that portion of our society least able to bear the deprivation." (*Id.* at p. 683, 131 Cal.Rptr. 789, 552 P.2d 749.)

In awarding section 3287(a) interest in the mandamus action, the *Tripp* court refused to consider the defendant's argument "that to award interest under [section 3287(a)] on retroactive benefits to welfare recipients who have been denied benefits ***1032** but are successful in obtaining them after *judicial* review will discriminate against recipients who have been denied benefits but are successful in obtaining them after an administrative appeal to the Director." (*Tripp, supra,* 17 Cal.3d at p. 685, fn. 14, 131 Cal.Rptr. 789, 552 P.2d 749, original italics.) In declining to address the question, the *Tripp* court observed that it was "not presented with the question whether the latter class of recipients is similarly entitled to interest and do not now decide that question which in our view defendant lacks standing to raise." (*Tripp, supra,* 17 Cal.3d at p. 685, fn. 14, 131 Cal.Rptr. 789, 552 P.2d 749.)

Numerous courts have relied on the holding in *Tripp* to support an award of section 3287(a) interest for wrongfully withheld benefits in the context of a mandamus action. (See, e.g., *Olson v. Cory* (1983) 35 Cal.3d 390, 402, 197 Cal.Rptr. 843, 673 P.2d 720 [awarding interest on wrongfully withheld backpay and pension]; *Goldfarb v. Civil Service Com.* (1990) 225 Cal.App.3d 633, 636, 275 Cal.Rptr. 284 [wrongfully demoted psychologist awarded prejudgment interest on backpay after restoration to former position]; *Aguilar, supra,* 223 Cal.App.3d at pp. 242–243, 272 Cal.Rptr. 696, and cases cited; *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528, 1532–1534, 258 Cal.Rptr. 106 [prejudgment interest is payable on award of wrongfully withheld disability retirement benefits].)

*****118** In *Aguilar, supra,* 223 Cal.App.3d at page 242, 272 Cal.Rptr. 696, the Court of Appeal followed *Tripp* 's reasoning to hold that, once a court in a mandamus action determines the Board has wrongfully withheld unemployment insurance compensation, the claimants who appealed the Board's action may also recover section 3287(a) prejudgment interest as an element of the damages awarded on judicial review. In that case, the EDD denied unemployment insurance benefits to a group of farm workers in 1978 "on the grounds the workers were involved in a trade dispute and were therefore ineligible for unemployment benefits. EDD's determination ****1323** was upheld by an administrative law judge, the [Board] and in a superior court proceeding." (*Aguilar, supra,* 223 Cal.App.3d at p. 241, 272 Cal.Rptr. 696.)

In 1985, however, the Court of Appeal reversed the Board's decision and remanded the matter to the superior court to determine whether some claimants were eligible to receive benefits under an Unemployment Insurance Code provision allowing workers to receive benefits and refuse new work that was available because of a strike, lockout, or other labor dispute. (See *Campos v. Employment Development Dept.* (1982) 132 Cal.App.3d 961, 183 Cal.Rptr. 637.) The superior court in turn remanded the matter to the Board, which in 1987—nine years after the original denial of benefits—concluded that over 30 percent of the claimants were eligible for benefits. (*Aguilar, supra,* 223 Cal.App.3d at p. 241, 272 Cal.Rptr. 696.) EDD paid the benefits to those workers, but refused to pay any interest on the amounts owed. An administrative law judge reversed the EDD's decision and ordered the EDD to pay ***1033** interest on the benefits. (*Ibid.*) The Board on administrative appeal "found no authority for payment of interest in the Unemployment Insurance Code and reversed the administrative law judge's ruling." (*Ibid.*) The workers then filed a petition for peremptory writ of mandate in the superior court, which granted the writ and directed the EDD to pay interest on the wrongfully withheld employment benefits. (*Ibid.*) The EDD appealed the court's order, contending that prejudgment interest should not be part of the judgment rendered in the mandamus action. (*Ibid.*) *Aguilar* affirmed the superior court judgment.

Relying on *Tripp, supra,* 17 Cal.3d at pages 680 through 682, 131 Cal.Rptr. 789, 552 P.2d 749, *Aguilar* observed that prejudgment interest is payable as part of the damages awarded by a superior court in a mandamus action to recover *wrongfully withheld* benefits. (*Aguilar, supra,* 223 Cal.App.3d at p. 243, 272 Cal.Rptr. 696.) As the *Aguilar* court observed, a claimant's right to interest depends on whether the claimant satisfied the requirements of section 3287(a). (*Aguilar, supra,* 223 Cal.App.3d at p. 244, 272 Cal.Rptr. 696.) *Aguilar* concluded that "[i]n calculating the compensation an unemployed person may receive we believe California is free to include interest on wrongfully denied claims." (*Id.* at p. 245, 272 Cal.Rptr. 696.) Of significance here is the fact that the court in *Aguilar,* like the *Tripp* court, refused to address the question whether benefit claimants may seek interest for the time spent in the routine processing of their benefit eligibility claim, and in the absence of a wrongful denial of benefits by the Board. *Aguilar* simply observed that "... the EDD's appeal is from a superior court judgment directing the payment of interest. Plainly,

under [*Tripp*] the superior court was empowered to order the agency to pay interest." (*Id.* at p. 246, fn. 4, 272 Cal.Rptr. 696.)

Thus, while not addressing the question whether the Board, or administrative law judges acting on its behalf, may award prejudgment interest on benefits, *Aguilar* does hold that a claimant for unemployment insurance benefits may receive section 3287(a) interest as part of the court's judgment on mandamus concluding that the Board wrongfully withheld benefits. (*Aguilar, supra,* 223 Cal.App.3d at pp. 245–246, 272 Cal.Rptr. 696.) As part of its judgment, the superior court may also order the EDD to pay wrongfully denied benefits retroactive to the date they became due. (*Ibid.*) Because the court has the power to award prejudgment interest on damages under section 3287(a), it may also award prejudgment interest in addition to the wrongfully withheld benefits. As the *Tripp* court observed, the interest awarded compensates claimants for the egregious delay ***119** or long period of time required to vindicate their right to aid in the mandamus action. (*Tripp, supra,* 17 Cal.3d at p. 683, 131 Cal.Rptr. 789, 552 P.2d 749; see U.S. Dept. of Labor, Unemp. Ins. Program Letter No. 11–92 (Dec. 30, 1991) [because interest is not paid as part of unemployment benefits, but only to compensate for the delay in payment of compensation, it may not be paid from the state unemployment fund, but must be paid as a separate administrative expense].)

***1034** Both *Tripp* and *Aguilar,* therefore, awarded interest solely for the delay caused by the ****1324** necessity of a mandamus action. As the Board observes, neither case supports an award of interest on claims resolved in administrative proceedings. Thus, the statutory scheme for processing unemployment insurance claims (Unemp.Ins.Code, § 100 et seq.), and the strict requirements for allowing even a court to award section 3287(a) interest in a mandamus action (including that the damages result from the wrongful withholding of benefits), compel our conclusion that there is no implied authority granting the Board and administrative law judges acting on behalf of the EDD the power to award section 3287(a) interest as an additional unemployment insurance benefit.

The Board relies, in part, on analogous reasoning in *Dyna–Med, supra,* 43 Cal.3d 1379, 241 Cal.Rptr. 67, 743 P.2d 1323, and *Peralta, supra,* 52 Cal.3d 40, 276 Cal.Rptr. 114, 801 P.2d 357. Both cases discussed the constitutional and statutory limitations on an administrative agency's powers. AFL–CIO, on the other hand, asserts that because both *Tripp* and *Aguilar* held that interest awarded in mandamus actions vests on the date the claimant was entitled to receive payment of unemployment insurance, entitlement to interest is automatic, even though the Unemployment Insurance Code does not provide for it. AFL–CIO argues, "[w]orkers therefore are entitled to interest on retroactive compensation recovered in administrative appeals no less than on retroactive compensation recovered in Court." AFL–CIO urges us to uphold the Court of Appeal judgment allowing the Board to pay prejudgment interest in this case, and to adopt the Court of Appeal's reasoning in *Knight, supra,* 26 Cal.App.4th 747, 31 Cal.Rptr.2d 832, which ruled that administrative law judges were authorized to award prejudgment interest on welfare benefits.

As we explain, we agree with the Board. Had the Legislature intended to grant the Board and administrative law judges acting on behalf of the EDD the power to award prejudgment interest on benefit payments, it could have easily done so, as it has in other administrative contexts. (See, e.g., Welf. & Inst.Code, § 14171, subd. (h) [allowing Medi–Cal provider to recover interest on successful administrative appeal of disallowed payment]; see also, Gov.Code, § 926.10 [interest on liquidated tort claims against public agency commences on 61st day after claim filed].) We will not infer from inapposite provisions of the Unemployment Insurance Code, however, that by allowing the superior court to award interest on wrongfully withheld benefits, the Legislature intended by implication to grant the Board the same authority to award interest merely because at some point in the administrative process someone made an error that the administrative agency (here, the Board) itself corrected.

*1035 2. *Dyna–Med and Peralta*

In *Dyna–Med, supra,* 43 Cal.3d 1379, 241 Cal.Rptr. 67, 743 P.2d 1323, the sole question before us was whether the Fair Employment and Housing Act (FEHA) granted the Fair Employment and Housing Commission (FEHC) the authority to award punitive damages. We observed that resolution of the issue depended on the meaning of Government Code former section 12970, subdivision (a), which set forth the scope of relief available from the FEHC. (*Dyna–Med, supra,* 43 Cal.3d at p. 1385, 241 Cal.Rptr. 67, 743 P.2d 1323.) That section then provided: "If the commission finds that a respondent has engaged in any unlawful practice under this part, it shall state its findings of fact and determination and shall issue ... an order requiring such respondent to cease and desist from such unlawful practice and to take such action, including,

but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, and restoration ***120** to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance." (Gov.Code, former § 12970, subd. (a); Stats.1984, ch. 1754, § 3, p. 6406.)

The *Dyna–Med* majority concluded that the FEHC did not have authority to award punitive damages, observing that the statutorily authorized remedies under the FEHA—"hiring, reinstatement, upgrading with or without back pay, restoration to membership in a respondent labor organization—are exclusively **1325** corrective and equitable in kind. They relate to matters which serve to make the aggrieved employee whole in the context of the employment." (*Dyna–Med, supra,* 43 Cal.3d at p. 1387, 241 Cal.Rptr. 67, 743 P.2d 1323.) We rejected the Court of Appeal's conclusion that the enabling statute impliedly authorized the FEHC to award punitive damages because " '... the Legislature delegated broad authority to the [FEHC] to fashion appropriate remedies for unlawful employment practices in [Government Code former] section 12970, subdivision (a)....' " (*Dyna–Med, supra,* 43 Cal.3d at p. 1385, 241 Cal.Rptr. 67, 743 P.2d 1323.)

Dyna–Med declined to grant the FEHC a power not conferred by an enabling statute, in particular observing that "[a]n administrative agency cannot by its own regulations create a remedy which the Legislature has withheld. [Citations.]" (*Dyna–Med, supra,* 43 Cal.3d at p. 1389, 241 Cal.Rptr. 67, 743 P.2d 1323.) We then rejected the argument that the failure to allow identical remedies in the judicial and quasi-judicial forums amounted to a denial of equal protection, observing, "... neither policy considerations nor equal protection concerns require that the administrative and judicial remedies be identical. To the contrary, the separate avenues justify different remedies." (*Id.* at p. 1402, 241 Cal.Rptr. 67, 743 P.2d 1323.) *Dyna–Med* specifically reaffirmed the rule that administrative regulations *1036 purporting to enlarge the scope of administrative powers are void, and that courts are obligated to strike them down. (*Id.* at p. 1389, 241 Cal.Rptr. 67, 743 P.2d 1323; cf. *Peralta, supra,* 52 Cal.3d 40, 276 Cal.Rptr. 114, 801 P.2d 357.)

Thus, although we agreed in *Dyna–Med* that under Civil Code section 3294, a court could award punitive damages, we refused to grant the administrative agency the same power in the absence of specific legislative direction. *Dyna–Med* concluded that "[a]bsent express language dictating otherwise, it will not be presumed that the Legislature intended to authorize an administrative agency—free of guidelines or limitation—to award punitive damages in proceedings lacking the protections mandated in a court of law." (*Dyna–Med, supra,* 43 Cal.3d at p. 1392, 241 Cal.Rptr. 67, 743 P.2d 1323.)

We reached a similar conclusion on the limitation of agency powers in *Peralta, supra,* 52 Cal.3d 40, 276 Cal.Rptr. 114, 801 P.2d 357. There we observed that the sole issue before us was "whether under the employment discrimination provisions of the FEHA, which make no reference to compensatory or any damages, the [FEHC] has the authority to award ... compensatory damages, or must an employee who seeks such damages pursue his or her judicial remedies in a court action." (*Peralta, supra,* 52 Cal.3d at p. 48, 276 Cal.Rptr. 114, 801 P.2d 357.) Relying on our decision in *Dyna–Med, supra,* 43 Cal.3d 1379, 241 Cal.Rptr. 67, 743 P.2d 1323, the *Peralta* majority concluded that the legislative objective of providing for speedy relief unburdened with procedural technicalities did not justify allowing the FEHC to award compensatory damages that could be awarded in a private court action. (*Peralta, supra,* 52 Cal.3d at p. 54, 276 Cal.Rptr. 114, 801 P.2d 357.) Noting that the FEHA provides for "alternative routes" to resolution of claims, we emphasized the fact that "... a primary purpose of the alternative systems of redress for employment discrimination is to permit efficient and prompt administrative disposition—without cost to the victim—of claims that are amenable to conciliation or to corrective equitable remedies, and thus do not warrant a full-scale judicial proceeding with its attendant expense and delay [citation], while reserving to the judicial system, with its attendant constitutional and statutory safeguards, those statutory claims that ***121** seek significant nonquantifiable monetary recompense or that the complainant wishes to join with nonstatutory causes of action." (*Peralta, supra,* 52 Cal.3d at p. 55, 276 Cal.Rptr. 114, 801 P.2d 357, fn. omitted.) Thus, we concluded that in enacting the FEHA, the Legislature did not "intend to authorize the Commission to adjudicate noneconomic general damage claims traditionally awarded in judicial actions between private parties [citations]." (*Id.* at p. 56, 276 Cal.Rptr. 114, 801 P.2d 357.)

Both *Dyna–Med* and *Peralta* are instructive, and their analyses of the restrictions on **1326** administrative agency power apply equally here. As the Board observes, the function of the administrative law judge in a proceeding to *1037 recover unemployment insurance benefits is simply to determine if claimants are eligible and then, if so, to calculate benefits owed based on length of employment. (Unemp. Ins.Code, § 301, subdivision (b).) At the administrative level benefits are not calculated

on the basis of wrongdoing or delay. Their calculation involves a simple step process enacted to generate "a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." (Unemp. Ins.Code, § 100 [statement of public policy].)

As we explained *ante,* at pages 112 through 114 of 56 Cal.Rptr.2d, at pages 1317 through 1319 of 920 P.2d, the initial mandatory process the Unemployment Insurance Code created contemplates only an administrative determination of benefit eligibility that requires at least an initial application to the EDD and, in some cases, second review by an administrative law judge. Claimants may not argue that their benefits have been *wrongfully*withheld until the Board erroneously determines they are ineligible, requiring them to seek administrative mandamus review in superior court. Until then, no wrongful withholding of benefits or delay attributable to the administrative process occurs. The Unemployment Insurance Code does not give the Board or its administrative law judges the statutory authority to award interest on an administrative award of benefits, and we cannot, by judicial fiat, create such authority. That determination is a matter for the Legislature.

3. *Knight*

In *Knight,* a majority of the Court of Appeal relied on *Tripp, supra,* 17 Cal.3d 671, 131 Cal.Rptr. 789, 552 P.2d 749, to conclude that administrative law judges may award section 3287(a) interest in the same proceeding in which they issue an award of retroactive in-home supportive services (Welf. & Inst.Code, § 10950 et seq.), because the interest is simply "a part of the underlying benefit to which a recipient is entitled." (*Knight, supra,* 26 Cal.App.4th at p. 754, 31 Cal.Rptr.2d 832.) *Knight* acknowledged that administrative agencies have only those powers that the Constitution or statutes have conferred on them. (E.g., *B.W. v. Board of Medical Quality Assurance* (1985) 169 Cal.App.3d 219, 234, 215 Cal.Rptr. 130.) *Knight* concluded, however, that the Department of Social Services' power to award benefits included the implied power to award prejudgment interest on those benefits. (*Knight, supra,* 26 Cal.App.4th at p. 754, 31 Cal.Rptr.2d 832.)

The *Knight* majority's principal rationale for this conclusion is that the purpose of an administrative hearing is to provide a speedy and informal ***1038** manner of challenging an administrative action that may reduce or terminate vitally needed benefits. (*Knight, supra,* 26 Cal.App.4th at pp. 755–756, 31 Cal.Rptr.2d 832.) The court reasoned, "If interest is part of the 'damage' to a recipient by not being awarded benefits in a timely fashion, then an award of interest is no different than an award of the benefits withheld. It is no more an exercise of 'judicial power' by the administrative hearing officer than the award of benefits." (*Id.* at p. 756, 31 Cal.Rptr.2d 832.) Moreover, the *Knight* majority concluded, "[a]llowing the matter of interest to be decided at the administrative hearing not only prevents courts from being burdened with matters that can be resolved adequately in administrative fora, but also prevents delay and unnecessary expense in vindication of legal rights through a multiplicity of proceedings. [Citations.]" (*Id.* at pp. 755–756, 31 Cal.Rptr.2d 832.)

*****122** Justice Yegan's dissent in *Knight* criticized the majority for acting as a "super-legislature" in giving administrative law judges a power not granted by the Legislature. (*Knight, supra,* 26 Cal.App.4th at p. 758, 31 Cal.Rptr.2d 832 (dis. opn. of Yegan, J.).) Although Justice Yegan observed that the majority's result was probably "consistent with administrative and judicial economy," he concluded that such an effect could not justify stretching "the law to achieve a desirable result." (*Id.* at pp. 757, 759, 31 Cal.Rptr.2d 832.)

****1327** We agree with Justice Yegan to the extent that he noted we should not sit as a super-legislature in modifying a statutory scheme that has never given administrative law judges the power to award section 3287(a) interest in the absence of a mandamus action awarding damages for the wrongful withholding of benefits. The *Knight* court's reliance on *Tripp* was misplaced. *Tripp* simply directed the trial court in the mandamus proceeding to award the section 3287(a) interest after it determined that the Director of the Department of Social Welfare had wrongfully withheld welfare benefits. (*Tripp, supra,* 17 Cal.3d at p. 685, 131 Cal.Rptr. 789, 552 P.2d 749.) The *Tripp* court even commented that an aggrieved party *must proceed by way of administrative mandamus* in order to challenge a wrongful denial of benefits. (*Id.* at p. 679, fn. 7, 131 Cal.Rptr. 789, 552 P.2d 749.) Thus, as we observed on page 119 of 56 Cal.Rptr.2d, page 1324 of 920 P.2d, *ante,* and contrary to the dissents of Justices Mosk and Kennard, *Tripp* 's concerns are not implicated in this case. Neither the *Tripp* court, nor any of its progeny (except *Knight*), considered whether administrative law judges have the authority to award section 3287(a) interest in the absence of wrongful action by the administrative agency. (*Tripp, supra,* 17 Cal.3d at p. 685, fn. 14, 131 Cal.Rptr. 789, 552 P.2d 749.) Moreover, the federal prompt

payment requirement of 42 United States Code section 503(a)(1), as construed in *California Human Resources Dept. v. Java, supra,* 402 U.S. at page 131, 91 S.Ct. at page 1354, provides sufficient incentive for the EDD to dispose of claims promptly and accurately without resort to the ***1039** threat of interest. (See also *Wilkinson, supra,* 627 F.2d at p. 661.) As we have often observed, "... cases are not authority for propositions not considered." (*Fricker v. Uddo & Taormina Co.* (1957) 48 Cal.2d 696, 701, 312 P.2d 1085.)

Knight 's reliance on *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 284 Cal.Rptr. 718, 814 P.2d 704 is also not persuasive. There, we concluded that the FEHA (Gov.Code, § 12987 et seq.), which authorized the FEHC to award "actual damages," included awards for special damages and other restitutionary relief, including out-of-pocket expenses. (*Walnut Creek Manor v. Fair Employment & Housing Com., supra,* 54 Cal.3d at pp. 255, 263, 284 Cal.Rptr. 718, 814 P.2d 704.) By contrast, the Unemployment Insurance Code contains restrictive provisions outlining the Board's statutory authority to compute benefits owed. We agree with AFL–CIO that we should not necessarily limit an agency's powers to those expressly granted, because the statutory scheme may "necessarily imply" those powers. (See, e.g., *Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 114, 192 Cal.Rptr. 455 [agency may exercise additional powers necessary for efficient administration of express statutory powers]; see also *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824–825, 258 Cal.Rptr. 161, 771 P.2d 1247.) But as we have shown, the Unemployment Insurance Code provisions strictly limit the powers of administrative law judges to determine eligibility and compute benefits. They do not grant either express or implied authority to award interest on benefit computations for the inconsequential delay that occurs when a claimant pursues entitlement benefits in the normal course of administrative review. (See, e.g., Unemp.Ins.Code, §§ 310, 1275.)

Knight also concluded that our opinions in *Lentz v. McMahon* (1989) 49 Cal.3d 393, 403–404, 261 Cal.Rptr. 310, 777 P.2d 83 (*Lentz*), and *Dyna–Med, supra,* 43 Cal.3d 1379, 241 Cal.Rptr. 67, 743 P.2d 1323, supported its result. (*Knight, supra,* 26 Cal.App.4th at p. 756, 31 Cal.Rptr.2d 832.) *Lentz* held that an administrative board's application of equitable estoppel in a county welfare agency action to recoup overpayments from welfare recipients did not constitute an impermissible *****123** exercise of a "judicial power" within the meaning of article VI, section 1, of the California Constitution. (*Lentz, supra,* 49 Cal.3d at p. 405, 261 Cal.Rptr. 310, 777 P.2d 83.) In so holding, the *Lentz* court distinguished in part our decision in *Dyna–Med* in which we held that the FEHA did not authorize the FEHC to award punitive damages in an employee discrimination case, but limited awards to corrective, equitable, nonpunitive remedies. (*Dyna–Med, supra,* 43 Cal.3d at p. 1387, 241 Cal.Rptr. 67, 743 P.2d 1323.) According to *Lentz,* the *Dyna–Med* rule did ****1328** not apply to equitable remedies. (*Lentz, supra,* 49 Cal.3d at p. 404, 261 Cal.Rptr. 310, 777 P.2d 83.) *Lentz* observed that *Dyna–Med* specifically ***1040** distinguished an award of " 'back pay' " from an award of punitive damages because the former remedy was " 'corrective and equitable in kind.' " (*Lentz, supra,* 49 Cal.3d at p. 404, 261 Cal.Rptr. 310, 777 P.2d 83.) Moreover, the *Lentz* court opined, "The Legislature's designation of the hearing as the only forum for public-benefits claims supports the view that it intended all potential issues affecting such claims to be raised in that forum." (*Ibid.*) The *Lentz* court also noted, "... if equitable estoppel claims were not considered in [Department of Social Services] hearings, no record and findings thereon reviewable under Code of Civil Procedure section 1094.5 would be produced. If that were the case, the doctrine of exhaustion of administrative remedies might be inapplicable to such claims, and claimants would be allowed to bring ordinary mandamus actions against the director under Code of Civil Procedure section 1085. [Citation.] The practical problems of requiring or permitting a claimant to seek ordinary mandamus relief in order to assert a claim of equitable estoppel—with evidentiary court hearings and the attendant inconvenience and expense to the parties and the judicial system—would contravene the purpose of the statutory scheme, if not the express provision that review under Code of Civil Procedure section 1094.5 'shall be the exclusive remedy available to the applicant or recipient or county for review of the director's decision.' [Citation.]" (*Lentz, supra,* 49 Cal.3d at p. 404, fn. 8, 261 Cal.Rptr. 310, 777 P.2d 83.)

As the Board observes, the question whether an estoppel defense should apply in an administrative hearing in which the government seeks to recoup overpayments to welfare recipients differs markedly from the question whether we should allow administrative law judges to award prejudgment interest in the absence of legislative authority. The awarding of section 3287(a) interest, in contrast to the availability of estoppel as a defense, would be inconsistent with the Legislature's apparent intent that the Unemployment Insurance Code simply do no more than compensate those who, through no fault of their own, are unemployed. (Unemp.Ins.Code, § 100.) Unlike the situation the *Lentz* court faced, here the government has not acted to recoup benefits it previously considered itself

estopped from recovering "in order to alleviate harsh consequences of recoupment when overpayment was caused by agency error." (*Lentz, supra,* 49 Cal.3d at p. 397, 261 Cal.Rptr. 310, 777 P.2d 83.) As the *Lentz* court noted, by refusing to allow welfare recipients facing recoupment demands to invoke the defense of equitable estoppel to compensate for "agency error," the Department of Social Services was reversing a long-standing policy. (*Ibid.*) By contrast, the Board, following the Unemployment Insurance Code, has never wavered from its position that it has no power, in the absence of a judgment (or other court directive), to award prejudgment interest on its award of unemployment insurance benefits. All cases before the *Knight* decision discussed these awards in the context of administrative ***1041** mandamus. (*Aguilar, supra,* 223 Cal.App.3d 239, 272 Cal.Rptr. 696.) We do not believe *Lentz* supports the *Knight*court's departure from such a broad spectrum of authority.

Finally, contrary to the Court of Appeal and the dissents here, the *Knight* court's attempt to distinguish *Dyna–Med, supra,* 43 Cal.3d 1379, 241 Cal.Rptr. 67, 743 P.2d 1323, is not persuasive. As the Board observes, the statutory scheme under the Unemployment Insurance Code is even more limited in scope than the FEHA, which governed the issue in *Dyna–Med.* (Cf. *Peralta, supra,* 52 Cal.3d 40, 276 Cal.Rptr. 114, 801 P.2d 357 *****124** [FEHC may not award compensatory damages].) Indeed, the *Knight* court simply overlooks the express statement of the *Dyna–Med* court that an administrative agency cannot impose a remedy the Legislature has withheld. (*Dyna–Med, supra,* 43 Cal.3d at p. 1389, 241 Cal.Rptr. 67, 743 P.2d 1323.)

We find the same rule must apply to an administrative agency that, sub silentio, attempts to expand or enlarge its power in the absence of either express or implied legislative authority. Indeed, the *Dyna–Med* court ****1329** observed that if it were to grant the commission additional powers in the absence of legislative directive, its rule "would authorize every administrative agency granted remedial powers to impose punitive damages so long as the statute directs that its provisions are to be liberally construed to effectuate its purposes." (*Dyna–Med, supra,* 43 Cal.3d at p. 1389, 241 Cal.Rptr. 67, 743 P.2d 1323, fn. omitted.) Similarly, if we were to allow the Board, and administrative law judges sitting on behalf of the EDD, to award prejudgment interest to successful claimants in the absence of either express or implied legislative authority, we potentially would be authorizing every administrative agency granted remedial powers to impose section 3287(a) interest, without consideration of the requirements for the award or the agency's authority to make it. In the absence of the requisite authority, we cannot expand the powers of the EDD or administrative law judges charged only with determining eligibility and computing benefits under the Unemployment Insurance Code by finding an implied power to award section 3287(a) interest. (See *Dyna–Med, supra,* 43 Cal.3d at p. 1389, 241 Cal.Rptr. 67, 743 P.2d 1323; *Cemetery Board v. Telophase Society of America* (1978) 87 Cal.App.3d 847, 858, 151 Cal.Rptr. 248 [courts may not supply statutory language that Legislature omitted].) We disapprove *Knight, supra,* 26 Cal.App.4th 747, 31 Cal.Rptr.2d 832, to the extent it conflicts with our analysis of the issue.

4. *Federal Law*

[3] As an alternative argument, AFL–CIO and its amici curiae (members of a class action in a coordinated proceeding pending in the Court of Appeal) assert that a conclusion that section 3287(a) does not allow administrative ***1042** law judges to award prejudgment interest on benefit claims made under the Unemployment Insurance Code conflicts with federal law requiring interest to be paid on public assistance benefits as soon as administratively feasible. By way of example, AFL–CIO and amici curiae cite to 42 United States Code section 503(a)(1), which, we have noted, mandates that a state's method of administering its unemployment insurance program must reasonably insure full payment of unemployment compensation "when due." (42 U.S.C. § 503(a)(1); see *California Human Resources Dept. v. Java, supra,* 402 U.S. 121, 135, 91 S.Ct. 1347, 1356, 28 L.Ed.2d 666 [invalidating state's practice of delaying payment of benefits pending resolution of administrative appeal].)

As noted (p. 113, fn.1 of 56 Cal.Rptr.2d, p. 1318, fn.1 of 920 P.2d, *ante*), in *Java, supra,* 402 U.S. at page 135, 91 S.Ct. at page 1356, the Supreme Court directed that compensation, including benefits owed, must be paid as soon as possible under the administrative scheme, once eligibility has been determined. The case does not even discuss the payment of prejudgment interest on wrongfully withheld benefits. Thus, federal law mandates that states not delay payment of unemployment insurance benefits when due following an administrative determination of claimant eligibility. (*California Human Resources Dept. v. Java, supra,* 402 U.S. at p. 133, 91 S.Ct. at p. 1355.) Nothing in 42 United States Code section 503(a)(1) or *Java* requires state administrative law judges to award prejudgment interest in administrative hearings determining benefit eligibility for unemployment insurance compensation, and those authorities do not

support AFL–CIO's argument.

[4] [5] As we have shown, it is well settled that administrative agencies have only the powers conferred on them, either expressly or by implication, by Constitution or statute. (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103, 77 Cal.Rptr. 224, 453 P.2d 728.) An administrative agency must act within the powers conferred upon it by law ***125** and may not act in excess of those powers. (*Id.* at p. 104, 77 Cal.Rptr. 224, 453 P.2d 728.) Actions exceeding those powers are void, and administrative mandate will lie to nullify the void acts. (*Aylward v. State Board etc. Examiners* (1948) 31 Cal.2d 833, 839, 192 P.2d 929.) Section 3287(a), even when harmonized with the Unemployment Insurance Code provisions governing payment of unemployment benefits, does not confer on the Board or administrative law judges the power to award prejudgment interest in a proceeding in which they conclude a claimant is eligible for unemployment insurance benefits.

****1330 CONCLUSION**

We conclude that administrative law judges do not have statutory authority to award section 3287(a) interest on a routine award of retroactive ***1043** unemployment insurance benefit payments. Pursuant to section 3287(a), and the provisions of the Unemployment Insurance Code, only a court may award prejudgment interest on its judgment following a mandamus action to recover benefits wrongfully withheld by Board. As the Legislature has refused to give administrative law judges either express or implied authority to award prejudgment interest, we must exercise judicial restraint in declining to find that authority in the Unemployment Insurance Code. Accordingly, we reverse the Court of Appeal judgment.

GEORGE, C.J., and BAXTER and BROWN, JJ., concur.

MOSK, Justice, dissents.

The "overriding legislative objective" (*Gibson v. Unemployment Ins. Appeals Bd.* (1973) 9 Cal.3d 494, 498, 108 Cal.Rptr. 1, 509 P.2d 945) of the unemployment insurance law is to establish "a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." (Unemp.Ins.Code, § 100.) Accordingly, we have held that "[t]he provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objective of reducing the hardship of unemployment." (*Gibson, supra,* 9 Cal.3d at p. 499, 108 Cal.Rptr. 1, 509 P.2d 945.) We should do likewise with the Civil Code. Instead, today's decision undermines the principle stated in *Gibson* because it "defeats the legislative objective of providing prompt administrative adjudication of claims for unemployment benefits without recourse to technical and formal requirements." (*Id.* at p. 496, 108 Cal.Rptr. 1, 509 P.2d 945.) I therefore dissent.

When the state wrongfully refuses to pay unemployment benefits, the applicant is entitled to interest on them. (*Aguilar v. Unemployment Ins. Appeals Bd.* (1990) 223 Cal.App.3d 239, 272 Cal.Rptr. 696.) "Civil Code section 3287, subdivision (a), ... authorizes the recovery of interest on damages which are certain or capable of being made certain by calculation, where the right to recover has vested on a particular day." (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 681, 131 Cal.Rptr. 789, 552 P.2d 749 (*Tripp*), overruled on another ground in *Frink v. Prod* (1982) 31 Cal.3d 166, 180, 181 Cal.Rptr. 893, 643 P.2d 476 (plur.opn.); accord, 31 Cal.3d at p. 181, 181 Cal.Rptr. 893, 643 P.2d 476 (conc. opn. of Mosk, J.).) Defendant concedes that Civil Code section 3287 authorizes an award of interest on wrongfully denied unemployment benefits.

The narrow question this case presents is whether the applicant must incur the expense and delay of going to court to receive such interest. I conclude that the law envisions, and public policy is most faithfully served by, a rule ***1044** that an administrative agency may award interest. (See *Sandrini Brothers v. Agricultural Labor Relations Bd.* (1984) 156 Cal.App.3d 878, 203 Cal.Rptr. 304.) I would so hold here. I cannot believe that the Legislature intended to require individual applicants to file suit in court to recover the relatively small sum represented by interest on benefits, because to so require would be effectively to bar them from recovering interest at all.

"[T]he right to payment of benefits vests when the claimant has established the facts which entitle him to the benefits." (*Aguilar v. Unemployment Ins. Appeals Bd., supra,* 223 Cal.App.3d at p. 245, 272 Cal.Rptr. 696.) Stated otherwise, the state's "obligation becomes a debt due as of the date an applicant ***126** is first entitled to receive aid." (*Tripp, supra,* 17 Cal.3d at p. 682, 131 Cal.Rptr. 789, 552 P.2d 749 [discussing welfare benefits].)

Hence for purposes of awarding interest those benefits are wrongfully withheld when initially denied, rather than when all administrative procedures are exhausted and a court rules that they should have been awarded. The applicant has lost the interest rightfully due him or her, and thus it is correct to treat the interest "not [as] a supplemental benefit but rather [as] a part of the underlying benefit to which a recipient is entitled." (*Knight v. McMahon* (1994) 26 Cal.App.4th 747, 754, 31 Cal.Rptr.2d 832 (*Knight*).) "Interest ... ****1331** relates to the extent of recovery inasmuch as it constitutes an element of damages." (*Tripp, supra,* 17 Cal.3d at p. 681, 131 Cal.Rptr. 789, 552 P.2d 749.)

Given that interest is due an applicant "as of the date an applicant is first entitled to receive aid" (*Tripp, supra,* 17 Cal.3d at p. 682, 131 Cal.Rptr. 789, 552 P.2d 749) when his or her application is wrongfully rejected, the question remains who may undertake the ministerial task of awarding that interest.

Civil Code section 3287, subdivision (a), implies that an administrative agency may do so. In relevant part it provides, without reference to a judgment by a court, that "[e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day...." By contrast, subdivision (b) of Civil Code section 3287 provides: "Every person who is entitled *under any judgment* to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date *prior to the entry of judgment* as the court may, in its discretion, fix, but in no event earlier than the date the action was filed." (Italics added.) "When a statute omits a provision which another statute embracing a similar subject includes, a different legislative intent for each statute is indicated." (*In re* ***1045** *Khalid H.* (1992) 6 Cal.App.4th 733, 736, 8 Cal.Rptr.2d 414.) The Legislature did not intend to require a judgment before interest could be awarded under subdivision (a) of Civil Code section 3287.

Moreover, as a matter of policy it is inefficient to require an applicant to proceed to court at considerable expenditure of money, time and court resources so that a judge can exercise the rote function of calculating interest. The majority's result imposes a gross judicial diseconomy. "The general principle that courts should not be burdened with matters which can be adequately resolved in administrative [forums], frequently expressed in the rule requiring exhaustion of administrative remedies [citations], is founded at least in part on the wisdom of the efficient use of governmental resources. [Citation.] Such use serves the twin goals of avoiding delay and unnecessary expense in vindication of legal rights." (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 680–681, 170 Cal.Rptr. 484, 620 P.2d 1032.)

It is not a function of the judiciary to compute sums certain in a proceeding with no controversy requiring resolution. In the different but analogous context of *Tripp, supra,* 17 Cal.3d at page 682, 131 Cal.Rptr. 789, 552 P.2d 749, we observed that "the entire scheme of our welfare laws serves to promote certainty as to the amount of benefits payable by setting forth fixed payment schedules. [Citation.] Once an applicant's entitlement to benefits is established, the calculation of the amount of such benefits becomes a mechanical exercise of applying the appropriate standard of assistance. The recovery of wrongfully withheld benefits thus is not subject to the uncertainty that would otherwise bar an award of interest." As the Court of Appeal herein explained, "no discretion is involved in an award of interest. Once an [administrative law judge (ALJ)] determines that retroactive compensation is due, the ALJ must award interest under Civil Code section 3287, subdivision (a). And second, the calculation of the interest due does not involve judgment—it requires simple arithmetic or reference to established tables." (See Unemp. Ins.Code, § 1280, subds. (a), (d) [schedule of benefits].)

Under these circumstances, the only reasonable policy is to allow resolution of the issue of interest at the administrative level. *****127** "Allowing the matter of interest to be decided at the administrative hearing not only prevents courts from being burdened with matters that can be resolved adequately in administrative fora, but also prevents delay and unnecessary expense in vindication of legal rights through a multiplicity of proceedings." (*Knight, supra,* 26 Cal.App.4th at pp. 755–756, 31 Cal.Rptr.2d 832.)

Today's decision also runs counter to notions of simple fairness to applicants for unemployment benefits. The practical result is to deny them ***1046** interest to which they are entitled, and although the majority make some cogent observations about certain fine points of legislative intent, they miss the key ****1332** conclusion: that the Legislature could not have intended such a result. As *Knight* observed, "[t]he right to interest on retroactive public assistance benefits would become meaningless if public assistance claimants did not have an administrative forum to raise such a claim, given their limited access to legal services. It is tantamount to denying a hearing on the recipient's right to interest." (26 Cal.App.4th at pp.

756–757, 31 Cal.Rptr.2d 832.) So it is with unemployment insurance applicants: it can hardly be said that they are in a much better position than public assistance applicants to vindicate their rights. " 'The [unemployment insurance] law deals with a class of persons for whom the Legislature has expressed a particular concern and with a class of persons who are highly unlikely to be skilled either in law or in semantics and, thus, particularly dependent on the administrative agency to help them in securing the benefits that the law provides.' " (*Gibson v. Unemployment Ins. Appeals Bd., supra,* 9 Cal.3d at pp. 498–499, 108 Cal.Rptr. 1, 509 P.2d 945.)

With regard to the question whether awarding interest in an administrative forum violates the state Constitution's judicial power or separation of powers clauses (Cal. Const., art. VI, § 1; *id.,* art. III, § 3), the answer is no. "If [loss of] interest [income] is part of the 'damage' to a recipient by not being awarded benefits in a timely fashion, then an award of interest is no different than an award of the benefits withheld. It is no more an exercise of 'judicial power' by the administrative hearing officer than [is] the award of benefits." (*Knight, supra,* 26 Cal.App.4th at p. 756, 31 Cal.Rptr.2d 832.)

Because the Legislature clearly did not intend that unemployment insurance applicants be denied interest lawfully due them, one would hope it will address the issue presented in this case to correct the majority's erroneous result.

WERDEGAR, J., concurs.

KENNARD, Justice, dissents.

I dissent.

The majority holds that the state need not pay interest on retroactive unemployment compensation when an erroneous determination of noneligibility is reversed on administrative appeal. To justify this holding, the majority has seized on a phrase from this court's opinion in *Tripp v. Swoap* (1976) 17 Cal.3d 671, 131 Cal.Rptr. 789, 552 P.2d 749, invested it with a meaning the *Tripp* court never intended it to have, and by this means invented a new requirement for recovering interest under Civil Code section 3287, subdivision (a) (hereafter section 3287(a)). In the process, the majority decides an issue that was uncontested and unbriefed in this litigation.

***1047** The right to receive unemployment compensation vests when the claimant proves facts establishing eligibility. (*Aguilar v. Unemployment Ins. Appeals Bd.* (1990) 223 Cal.App.3d 239, 245, 272 Cal.Rptr. 696.) If, despite the claimant's proof of eligibility, the California Employment Development Department (EDD) erroneously denies the claim, the claimant may take an administrative appeal and, if unsuccessful there, obtain judicial review. Once the EDD's error in denying eligibility has been acknowledged and corrected, either by administrative appeal or by judicial review, the claimant is entitled to receive the benefits retroactive to the date of vesting. To compensate for the delay in payment during the administrative appeal and judicial review, the claimant is entitled under section 3287(a) to interest on the retroactively awarded benefits from the date of vesting. *****128** (*Aguilar v. Unemployment Ins. Appeals Bd., supra,* 223 Cal.App.3d 239, 240, 245–246, 272 Cal.Rptr. 696.)

The issue this court granted review to decide was whether, when an erroneous determination of noneligibility is reversed on administrative appeal, the Unemployment Insurance Appeals Board (the Board), or an administrative law judge acting on the Board's behalf, may include the interest in an award of retroactive benefits. In both the trial court and the Court of Appeal, and in this court as well, the Board has conceded that section 3287(a) entitles the claimant to interest in this situation, but it has taken the position that only a court has the authority to make the interest award. (See ****1333** *Aguilar* v. *Unemployment Ins. Appeals Bd., supra,* 223 Cal.App.3d 239, 246, fn. 4, 272 Cal.Rptr. 696 [declining to address this issue].)[1] Both the trial court and the Court of Appeal concluded, to the contrary, that the Board (and administrative law judges acting for the Board) have authority to make the interest award.

Reversing the Court of Appeal, the majority goes outside the issue as framed by the parties to hold that the claimant may not recover interest at all, ***1048** either from a court or from the Board, if the EDD's erroneous determination of noneligibility is corrected, and the retroactive benefits awarded, on administrative appeal. The majority concludes that a claimant may recover interest only when an erroneous determination of noneligibility is corrected on *judicial* review.

As support for this holding, the majority offers this reasoning: (1) Interest may be awarded under section 3287(a) only when benefits are "wrongfully denied"; (2) benefits awarded retroactively by administrative appeal after an erroneous determination of noneligibility have not been "wrongfully denied"; and, therefore, (3) interest

may not be awarded under section 3287(a) on retroactive benefits awarded by administrative appeal after an erroneous determination of noneligibility. The authorities that the majority cites provide no support for this reasoning.

The phrase "wrongfully denied" does not appear in section 3287(a). That provision reads: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state."

As this court has explained, section 3287(a) imposes three requirements for an award of interest: (1) "an underlying monetary obligation," (2) an amount due under that obligation that is "certain or capable of being made certain by calculation," and (3) vesting of the right of recovery "on a particular day." (*Tripp v. Swoap, supra,* 17 Cal.3d 671, 682, 131 Cal.Rptr. 789, 552 P.2d 749.) Each of these requirements is satisfied when an erroneous determination of noneligibility prevents timely payment of unemployment compensation: ***129** (1) the state has a "monetary obligation" to pay unemployment compensation to all persons who demonstrate eligibility, (2) the amount of compensation due is certain or capable of being made certain by calculation, and (3) the right to receive unemployment compensation vests on a particular day (that is, upon proof of eligibility). (*Aguilar v. Unemployment Ins. Appeals Bd., supra,* 223 Cal.App.3d 239, 245, 272 Cal.Rptr. 696.) These three requirements are satisfied irrespective of the means by which an erroneous determination of noneligibility is corrected—administrative appeal or judicial review.

The majority concedes that the three statutory requirements are satisfied, and interest **1334 must be awarded, when a claimant obtains retroactive unemployment compensation benefits by judicial review, but it asserts that the *1049 EDD need not pay any interest when retroactive benefits are awarded on administrative appeal. To justify this result, the majority adds a fourth, nonstatutory requirement, that the benefits be "wrongfully denied" or "wrongfully withheld." The majority asserts that unemployment compensation has not been "wrongfully denied" or "wrongfully withheld" unless and until the unemployment compensation claim has been denied by the Board itself. The majority attributes this nonstatutory requirement to this court's opinion in *Tripp v. Swoap, supra,* 17 Cal.3d 671, 131 Cal.Rptr. 789, 552 P.2d 749.

The phrases "wrongfully withheld" and "wrongfully denied" do appear in this court's opinion in *Tripp,* but not as an additional nonstatutory requirement for an interest award under section 3287(a). *Tripp* was an action in administrative mandamus (Code Civ. Proc., § 1094.5) to review a decision by the Director of the State Department of Social Welfare denying an application for welfare benefits under the aid to the needy disabled (ATD) program based on a determination that the applicant had not proved she was permanently disabled. The trial court ruled that this determination was not supported by substantial evidence, and it directed that the applicant receive the benefits retroactively with attorney fees and interest. (*Tripp v. Swoap, supra,* 17 Cal.3d 671, 675–676, 131 Cal.Rptr. 789, 552 P.2d 749.)

On appeal, this court agreed that "the recipient of *wrongfully withheld* welfare benefits" (*Tripp v. Swoap, supra,* 17 Cal.3d 671, 678, 131 Cal.Rptr. 789, 552 P.2d 749, italics added) was entitled to interest under section 3287(a). Examination of this court's use of the terms "wrongfully denied" and "wrongfully withheld" in *Tripp v. Swoap, supra,* 17 Cal.3d 671, 131 Cal.Rptr. 789, 552 P.2d 749, demonstrates that they were not given any special meaning, intended to be an additional nonstatutory requirement for recovery of interest under section 3287(a), or intended to describe only the situation in which benefits were denied after exhaustion of administrative appeal. For example, explaining why the trial court had authority to direct retroactive payment of the ATD welfare benefits, this court said: "[H]aving determined that plaintiff had been *wrongfully denied* ATD benefits as a matter of law, the trial court merely rendered a judgment ordering defendant to discharge his legal obligation. Inasmuch as an ATD applicant is entitled by statute to benefits as of a particular date once eligibility is established ([Welf. & Inst.Code,] § 11056), there was no issue remaining on which the trial court could invade the director's discretion." (*Tripp v. Swoap, supra,* 17 Cal.3d 671, 677, 131 Cal.Rptr. 789, 552 P.2d 749, italics added.) Thus, the benefits were "wrongfully denied" because the agency, without legal justification, had not paid them when due. A denial is no less wrongful, and no less a denial, when it is corrected by administrative appeal rather than judicial review.

The majority asserts that "*Tripp* emphasized that the recovery of prejudgment interest under section 3287(a) required *an action for damages,* which *1050 included wrongfully denied benefits." (Maj. opn., *ante,* at p. 117 of

56 Cal.Rptr.2d, at p. 1322 of 920 P.2d, italics added.) The majority cites footnote 12 of this court's opinion in *Tripp,* but that footnote says only that the operation of section 3287(a) is "predicated on the *existence* of damages" and that "wrongfully withheld welfare benefits" are damages for purposes of section 3287(a). ***130** (*Tripp v. Swoap, supra,* 17 Cal.3d 671, 682, fn. 12, 131 Cal.Rptr. 789, 552 P.2d 749, italics added.) In response to the argument that granting section 3287(a) interest after judicial review would discriminate against those who obtain benefits by administrative appeal, this court, in another footnote, expressly declined to address that issue, stating: "We are not presented with the question whether the latter class of recipients is similarly entitled to interest and do not now decide that question which in our view defendant lacks standing to raise." (*Tripp v. Swoap, supra,* at p. 685, fn. 14, 131 Cal.Rptr. 789, 552 P.2d 749.)

The meaning of "wrongfully denied" is perhaps best understood by examining this court's discussion of the policy basis for awarding interest on retroactive benefits: "The same public policy that favors the **1335 award of retroactive benefits would appear to favor the award of prejudgment interest on such benefits. Indeed, we have recognized in the context of an interest award on retroactive salary payments that '[i]f plaintiff had not been wrongfully suspended, he would have obtained the benefit of the moneys paid as of those dates; he has thus lost the natural growth and productivity of the withheld salary in the form of interest.' (*Mass v. Board of Education* [(1964)] 61 Cal.2d [612,] 625, 39 Cal.Rptr. 739, 394 P.2d 579.) The policy rationale behind awarding prejudgment interest articulated in *Mass* takes on particular significance in the context of wrongfully withheld welfare benefits. In some instances, it may take long periods of time for an applicant to vindicate his [or her] entitlement to aid and in the interval the delay inevitably exacts its toll from that portion of our society least able to bear the deprivation." (*Tripp v. Swoap, supra,* 17 Cal.3d 671, 683, 131 Cal.Rptr. 789, 552 P.2d 749.)

This policy rationale applies fully to unemployment compensation that is awarded retroactively on administrative appeal. During the period of the delay occasioned by the erroneous initial determination of noneligibility, the unemployment compensation claimant is denied the use of the funds at a time of particular economic hardship. The toll exacted by delay in payment is no easier to bear when the delay is attributable to administrative rather than judicial proceedings.

To escape the force of this logic, the majority, without benefit of supporting data, characterizes as "inconsequential" (maj. opn., *ante,* at p. 122 of 56 Cal.Rptr.2d, at p. 1327 of 920 P.2d) the *1051 delay in payment occasioned by an erroneous initial determination of noneligibility that is corrected by administrative appeal. This dismissive characterization cannot be squared with the United States Supreme Court's decision in *California Dept. of Human Resources Develop.* v. *Java* (1971) 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666.

At issue in *Java* was the validity of a California statute (former Unemployment Insurance Code section 1335) under which the EDD automatically suspended payment of unemployment compensation whenever the claimant's most recent employer filed an administrative appeal from an initial determination of eligibility. (*California Dept. of Human Resources Develop.* v. *Java, supra,* 402 U.S. 121, 128, 91 S.Ct. 1347, 1352, 28 L.Ed.2d 666.) Noting that the processing of the appeal took "between six and seven weeks" (*ibid.*), the court concluded that suspension of payments for this period of time frustrated one of the basic purposes of the Social Security Act (42 U.S.C. §§ 501–503), which was "to provide a substitute for wages lost during a period of unemployment not the fault of the employee" (*California Dept. of Human Resources Develop.* v. *Java, supra,* 402 U.S. 121, 130, 91 S.Ct. 1347, 1353, 28 L.Ed.2d 666), and to make this substitute available "at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard" (*id.* at p. 131, 91 S.Ct. at p. 1354). Observing that "delaying compensation until months have elapsed defeats these purposes," the court concluded that "the California procedure, which suspends payments for a median period of seven weeks pending [administrative] appeal, after an initial determination of eligibility has been made, is not 'reasonably calculated to insure full payment of unemployment compensation when due.' " (*Id.* at p. 133, 91 S.Ct. at p. 1355, fn. omitted.) The court enjoined enforcement ***131** of the California statute. (*Id.* at p. 135, 91 S.Ct. at p. 1356.)

There is no evidence in the record before this court that the time required to process an administrative appeal has diminished in the years since the United States Supreme Court's decision in *California Dept. of Human Resources Develop.* v. *Java, supra,* 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666. Indeed, the delay at issue in this very case was 10 weeks. (Maj. opn., *ante,* at p. 115 of 56 Cal.Rptr.2d, at p. 1320 of 920 P.2d.) I fail to see how this court can characterize a delay of seven weeks (the median time required to process an administrative appeal) or ten weeks (the delay at issue in this case), during which an unemployed worker is deprived of the wages substitute for which he or she has demonstrated eligibility, as

"inconsequential." In light of *Java,* the majority is simply ****1336** wrong when it asserts that until the Board has acted, "no wrongful withholding of benefits or delay attributable to the administrative process occurs." (Maj. opn., *ante,* at p. 121 of 56 Cal.Rptr.2d, at p. 1326 of 920 P.2d.)

***1052** The majority appears to hint that allowing an administrative agency to award interest under section 3287(a) would somehow violate the constitutional doctrine of separation of powers. Yet, as the majority itself acknowledges (maj. opn., *ante,* at pp. 119–120 of 56 Cal.Rptr.2d, at pp. 1323–1324 of 920 P.2d), the Legislature has authorized administrative agencies to award interest in other contexts, and such administrative interest awards have never been found invalid as violating the doctrine of separation of powers. Because their determinations are subject to judicial review on administrative mandamus using the independent judgment standard of review, the EDD and the Board may adjudicate unemployment compensation claims without violating the doctrine of separation of powers.[2] (See *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 108, 172 Cal.Rptr. 194, 624 P.2d 244; *Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 775–781, 163 Cal.Rptr. 619, 608 P.2d 707; *Tex–Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 343–346, 156 Cal.Rptr. 1, 595 P.2d 579.) Because an administrative interest award under section 3287(a) would be subject to the same judicial review, I fail to see how such an administrative interest award could be deemed an improper delegation or improper exercise of judicial authority.

In support of its holding, the majority also relies on this court's decisions in *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 276 Cal.Rptr. 114, 801 P.2d 357 and *Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 241 Cal.Rptr. 67, 743 P.2d 1323, holding that the Fair Employment and Housing Commission (FEHC) lacks implied authority to award compensatory and punitive damages for employment discrimination. But those decisions are distinguishable.

In *Peralta,* this court noted that in the Fair Employment and Housing Act (FEHA) the Legislature had established "alternative systems of redress for employment discrimination" (*Peralta Community College Dist. v. Fair Employment & Housing Com., supra,* 52 Cal.3d 40, 55, 276 Cal.Rptr. 114, 801 P.2d 357), with the administrative system to handle "claims that are amenable to conciliation or to corrective ***1053** equitable remedies" and the judicial system to handle "those statutory claims that seek significant nonquantifiable monetary recompense or that the complainant wishes to join with nonstatutory causes of action" (*ibid.*). To effectuate this implied legislative partition of authority, this court determined that the FEHC did not have implied authority to award compensatory *****132** damages for emotional distress caused by employment discrimination. (*Id.* at p. 56, 276 Cal.Rptr. 114, 801 P.2d 357.) This court stressed that it was unlikely the Legislature had intended a "grant by implication of unbridled power to an administrative agency to make monetary awards without guidelines or limitations." (*Id.* at p. 60, 276 Cal.Rptr. 114, 801 P.2d 357.)

The statutory scheme for unemployment compensation, unlike the FEHA, does not establish alternative administrative and judicial systems for obtaining redress. Administration of unemployment compensation is vested exclusively in the EDD and the Board, subject to judicial review; therefore, resort to the administrative process is the only means by which those who lose their jobs through no fault of their own may obtain unemployment compensation. Moreover, interest, ****1337** unlike emotional distress, is quantifiable and readily calculated without additional determinations of fact. Once the administrative law judge or the Board has decided that the previous determination of noneligibility was erroneous and has made the factual determinations necessary to award retroactive benefits—that is, the amount of compensation due and the date of vesting—calculating interest under section 3287(a) is a purely mathematical process, requiring no additional factual findings and no exercise of discretion. Because determining and awarding interest under section 3287(a) is not an exercise of "unbridled power ... without guidelines or limitations" (52 Cal.3d at p. 60, 276 Cal.Rptr. 114, 801 P.2d 357), there is no reason to believe that the Legislature intended to withhold from the Board the authority to perform this simple mathematical calculation.

Dyna–Med, in which this court held that the FEHC lacks implied authority under the FEHA to award punitive damages for job discrimination, is distinguishable for essentially the same reasons. Our decision was grounded on the availability of an alternative method of obtaining punitive damages for employment discrimination "by filing an independent civil action alleging tort causes of action either with or without an FEHA count" (*Dyna–Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d 1379, 1403, 241 Cal.Rptr. 67, 743 P.2d 1323) and on "the extraordinary nature of punitive damages" (*id.* at p. 1389, 241 Cal.Rptr. 67, 743 P.2d 1323). Interest is not "extraordinary," and an

unemployment compensation claimant has no independent judicial remedy.

Although the Legislature has not expressly authorized the Board to award section 3287(a) interest on retroactive unemployment compensation, the ***1054** Board has implied authority to do so. "It is well settled in this state that governmental officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers." (*Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 810, 151 P.2d 505, original italics; accord *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824, 258 Cal.Rptr. 161, 771 P.2d 1247.) As this court explained in *Tripp v. Swoap, supra,* 17 Cal.3d 671, 683, 131 Cal.Rptr. 789, 552 P.2d 749, the power to award section 3287(a) interest is the equitable and logical complement of the power to award retroactive benefits, a power that the Board unquestionably possesses and routinely exercises.

When employees lose their jobs through no fault of their own, every day of delay in obtaining the unemployment compensation to which they are legally entitled, and which may be their only source of income until they obtain new employment, is significant. I would not characterize delays of seven or ten weeks in the payment of unemployment compensation as "inconsequential," and I would recognize the Board's implied authority to add interest to unemployment compensation retroactively awarded after correction of administrative error. Accordingly, I would affirm the judgment of the Court of Appeal.

WERDEGAR, J., concurs.

Parallel Citations

13 Cal.4th 1017, 920 P.2d 1314, 96 Cal. Daily Op. Serv. 6499

Footnotes

* MOSK, KENNARD and WERDEGAR, JJ., dissented.

1 The prompt payment requirement that follows an eligibility determination is mandated by 42 United States Code section 503(a)(1), which requires payment of benefits "when due," and the high court's decision in *California Human Resources Dept. v. Java* (1971) 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666. The high court invalidated the EDD practice (pursuant to Unemp. Ins.Code, former § 1335) of stopping benefit payments whenever an employer appealed the EDD's benefit award. The court held that the practice of withholding benefits in the event of appeal violated the claimants' statutory right to receive prompt payment. (*California Human Resources Dept. v. Java, supra,* 402 U.S. at p. 133, 91 S.Ct. at p. 1355.) As the Third Circuit observed, "The critical factor is *timely* payment to *all* eligible persons, whether their eligibility is upheld initially or only after one or more appeals." (*Wilkinson v. Abrams* (3d Cir.1980) 627 F.2d 650, 661, fn. 14 (*Wilkinson*), italics in original.) The EDD now pays benefits following a finding of eligibility regardless of any appeal filed by an employer.

2 Because we resolve this case on the basis of statutory interpretation, we need not determine whether allowing an administrative law judge to award section 3287(a) interest would violate the judicial powers clause. (Cal. Const., art. VI, § 1.)

1 The majority cites *Aguilar* v. *Unemployment Ins. Appeals Bd., supra,* 223 Cal.App.3d 239, 272 Cal.Rptr. 696, for the proposition that "section 3287(a) interest may only be awarded in a mandamus action following the Board's wrongful withholding of benefits." (Maj. opn., *ante,* at p. 115 of 56 Cal.Rptr.2d, at p. 1320 of 920 P.2d.) In fact, *Aguilar* contains no such holding.

In that case, after the Board had denied benefits to a group of farm workers, administrative mandamus proceedings resulted in a remand to the Board for further proceedings, after which the Board awarded benefits to some of the claimants but refused to award interest. The claimants sought judicial review of the Board's decision *awarding benefits but declining to award interest.* The trial court issued a writ of mandate directing the Board to pay interest; the Board appealed. (*Aguilar* v. *Unemployment Ins. Appeals Bd., supra,* 223 Cal.App.3d 239, 240–241, 272 Cal.Rptr. 696.)

With the case in this posture, the Court of Appeal concluded that the trial court, in the administrative mandamus proceeding, had properly awarded interest. Replying to the Board's assertion that it lacked authority to award interest, the court said only this: "*Although we do not necessarily accept the limitation [the Board] proposes,* we note the [Board]'s appeal is from a superior court judgment directing the payment of interest. Plainly, under *Tripp v.*

Swoap the superior court was empowered to order the agency to pay interest." (*Aguilar* v. *Unemployment Ins. Appeals Bd., supra,* 223 Cal.App.3d 239, 246, fn. 4, 272 Cal.Rptr. 696, italics added.)

2 The majority cites this court's decision in *Laisne* v. *Cal. St. Bd. of Optometry* (1942) 19 Cal.2d 831, 123 P.2d 457 for the proposition that if the Board denies eligibility and the claimant seeks judicial review by administrative mandamus, the claimant is entitled to a "limited trial de novo" in which "the trial court exercises its independent judgment *on all the facts material to the claim, regardless of the record of proceedings before the Board.*" (Maj. opn., *ante,* at p. 114 of 56 Cal.Rptr.2d, at p.1319 of 920 P.2d, italics added.) In fact, a court applying the independent judgment standard may consider evidence outside the administrative record only when the evidence was improperly excluded or the evidence could not have been produced with reasonable diligence at the time of the administrative hearing. (Code Civ. Proc., 1094.5, subd. (e); 8 Witkin, Cal. Procedure (3d ed. 1985) Extraordinary Writs, § 291, p. 915.)

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