UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN BERNARDINO CITY PROFESSIONAL FIREFIGHTERS UNION, LOCAL 891, and RICHARD LEWIS, Plaintiffs, v. LARRY PITZER, etc., et al., Defendants.	Case No. EDCV 05-473-VAP(OPx) **[Motions filed on April 13 and 26, 2006]** **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR A WRIT OF MANDATE**

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

The Court has received and considered all papers filed timely in support of Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Writ of Mandate. The Motion is appropriate for resolution without hearing. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons set forth below, Defendants' Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART and Plaintiffs' Motion for Writ of Mandate is DENIED.

I. BACKGROUND

On May 4, 2005, Plaintiffs filed a Complaint in the Superior Court of California for the County of San Bernardino alleging the following claims: (1) Manadamus relief pursuant to a violation of California Government Code § 3500, et seq., (2) Manadamus relief pursuant to a violation of California Government Code § 3300, et seq., (3) a violation of California Labor Code § 1102.5, (4) violation of California Labor Code §§ 1101 and 1102, (5) violation of civil rights pursuant to 42 U.S.C. § 1983 against Defendant Larry Pitzer ("Pitzer"), and (6) violation of civil rights pursuant to 42 U.S.C. § 1983 against Defendant City of San Bernardino ("City").

Defendants filed a Motion for Summary Judgment ("Mot.") on April 13, 2006, and set it for hearing on May 8, 2006. Having received no timely Opposition from Plaintiffs, the Court took Defendants' Motion off calendar on April 28, 2006. [Minute Order of April 28, 2006.] The Court further held that the matter stood submitted on the moving papers. [Id.] On the afternoon of April 28, 2005, Plaintiffs filed an Opposition to Defendants' Motion and a "Response to Defendants' Statement of Uncontroverted Facts."[1]

[1] Under Local Rule 7-9, opposition papers to a motion are due no less than fourteen days before the hearing date. Thus, Plaintiff's Opposition was due on April 24, 2006, and was filed four days late.

II. PLAINTIFFS' UNTIMELY OPPOSITION

Plaintiffs' Opposition was due on April 24, 2006. On April 26, 2006, despite the fact that Plaintiffs' Opposition to this Motion was already untimely, Plaintiffs' counsel filed a Motion for a Writ of Mandate. It was not until April 28, 2006, that Plaintiffs' counsel filed an Opposition to this Motion. The untimely Opposition filed by Plaintiffs' counsel was unaccompanied by an ex parte request for a late filing or a continuance. Indeed, Plaintiffs' counsel failed to provide any explanation for the untimeliness of the Opposition.

Plaintiffs' counsel's failure to provide an explanation for the untimely Opposition deprives the Court of the information necessary to balance the reasons for the tardiness with the severe prejudice thereby imposed on Defendants. Plaintiffs' counsel chose not to seek a stipulated continuance from opposing counsel or, failing that, such relief from the Court.

The Opposition, in fact, was so untimely that it would have been virtually impossible for the Court to have held the hearing on the scheduled May 8, 2006, date. Allowing Plaintiffs to file Opposition four days late here without an excuse, thus, would allow an attorney to manipulate the Court's docket unfairly.

No good cause having been shown to consider the late opposition, the Court will enforce Local Rule 7-9. See United States v. Warren, 601 F.2d 471, 474 (9th Cir. 1979) ("Only in rare cases will we question the exercise of discretion in connection with the application of local rules.")

III. LEGAL STANDARD

A motion for summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998); Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

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Where the non-moving party has the burden at trial, however, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. Celotex, 477 U.S. at 325. Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's case. Id.

The burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The non-moving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. See also William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial § 14:144.

A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. In ruling on a motion for summary judgment, the Court construes the evidence in the light most favorable to the non-moving party. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991); T.W. Elec. Serv. Inc. v. Pac.

Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

IV. UNCONTROVERTED FACTS

The following material facts are adequately supported by admissible evidence and are uncontroverted.[2] They are "admitted to exist without controversy" for the purposes of this Motion. See L.R. 56-3.

Plaintiff Richard Lewis ("Lewis") is employed as a captain with the San Bernardino Fire Department ("Fire Department"). [Complaint ("Compl.") at ¶ 3.] Plaintiff San Bernardino City Professional Firefighters Union, Local 891 ("Union") is a union representing employees of the Fire Department below the rank of Battalion Chief. [Id. at ¶ 2.] Defendant Pitzer is the Fire Chief. [Id. at ¶ 5.]

Defendant Pitzer has authority to make decisions concerning the hiring and discharging of employees for the Fire Department; however, the Civil Service Board reviews these decisions, and for members of the bargaining unit, the decisions are reviewed pursuant to

[2] Because the Court is not considering Plaintiffs' Opposition, all relevant facts proposed by Defendants that are adequately supported by the evidence will be deemed to be uncontroverted. Defendants propose some facts that are unnecessary for the resolution of this Motion; the Court has not considered those facts.

the grievance procedures established by Plaintiff Union. [Declaration of Larry Pitzer ("Pitzer Decl.") at ¶ 2.] Defendant Pitzer does not have the authority to make decisions concerning personnel policies for Defendant City; this authority lies with the City Council, subject to certain limitations. [Id.]

The promotion process for a member of the Fire Department to be promoted to Battalion Chief involves a written examination administered by the City's Civil Service Department. [Id. at ¶ 5.] Those that pass the test undergo further testing by the Fire Department and candidates are ranked according to their score. [Id.] The departmental testing includes a written portion and assessments by senior members of the department and officials from other departments who observe the candidates in "real life simulations." [Id.]

Using the so-called "rule of three," in making a promotion decision, Defendant Pitzer may select one of the top three candidates for the position. [Id.] This method was negotiated with and approved by Plaintiff Union. [Id.]

The top three candidates for the Battalion Chief promotion were Skip Kulikoff ("Kulikoff"), Plaintiff Lewis, and Dennis Moon ("Moon"). [Id. at ¶ 5, Exs. C &

D.] As of March 2003, Kulikoff was the president of Plaintiff Union. [Id. at ¶ 4.] While Kulikoff was president of Plaintiff Union, he was a vigorous advocate of its positions; nevertheless, Defendant Pitzer promoted him because he was the best qualified candidate. [Id. at ¶ 4.] With the promotion of Kulikoff, there were only two names left on the promotion list: Plaintiff Lewis and Moon. [See id. at Ex. C.]

Plaintiff Lewis was Plaintiff Union's president from May 2003 to December 2004. [Id. at ¶ 6.] During that time, Plaintiff Union was involved in civil service challenges to personnel decisions made by Defendant Pitzer and the Fire Department, as well as a labor practice complaint with the Public Employment Relations Board ("PERB") alleging that the Fire Department violated the Meyers-Milias-Brown Act ("MMBA"). [Id.]

In November 2003, Plaintiff Lewis reported to the City Attorney's Office and to Defendant Pitzer that his wife was having an extra marital affair with Kulikoff. [Id. at ¶ 7.] Plaintiff Lewis confirmed the existence of the affair by wiretapping his home telephone and recording conversations between Kulikoff and Plaintiff Lewis's wife. [Id.]

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Defendant Pitzer ordered an internal investigation concerning Kulikoff's misconduct and the alleged illegal wiretapping by Plaintiff Lewis. [Id. at ¶ 8.] The San Bernardino Internal Affairs Department ("IA") conducted the investigation. [Id.] During an interview with Sergeant Ernie Lemos, Defendant Pitzer admitted that he tape-recorded telephone conversations between Kulikoff and Plaintiff Lewis's wife without their knowledge and did not act at the discretion of any law enforcement official. [Declaration of Ernie Lemos ("Lemos Decl.") at ¶ 3.] Defendant Pitzer decided not to discipline Plaintiff Lewis for his conduct and informed him of this by a memorandum dated June 7, 2004. [Pitzer Decl. at ¶ 9, Ex. G.]

After the allegations arose about Kulikoff's actions, he took a leave of absence and then a medical retirement; he never returned to work with the Fire Department. [Id.] Pursuant to the "rule of three," Defendant Pitzer was required to promote Plaintiff Lewis or Moon to Battalion Chief. [See id. at 10.] As it had been over a year since the performance evaluations of the two candidates, Defendant Pitzer decided to ask his senior management for their opinions about the candidates' performances. [Id.] The senior management team and Defendant Pitzer rated Moon as the better candidate, and

Defendant Pitzer promoted Moon to the position of Battalion Chief. [Id.]

The 2002 promotion list was set to expire in November 2004. [Id. at ¶ 11.] Plaintiff Lewis petitioned the San Bernardino Civil Service Board ("Board") to include his name on the list for another year. [Id.] The Board granted Plaintiff Lewis's request even though Plaintiff Union and Fire Department management opposed it. [Id.] No openings for Battalion Chief arose in the following year. [Id. at ¶ 12.]

In December 2004, Deputy Chief Brian Preciado left the Fire Department. [Id. at ¶ 13.] Defendant Pitzer offered the position to the Fire Department's Training Officer, Mat Fratus; however, he declined the offer. [Id. at ¶ 14.] Concluding that none of the Battalion Chiefs were suited for the job, Defendant Pitzer filled the Deputy Chief position on an interim basis. [Id. at ¶ 15.] In December 2005, someone from outside the Fire Department was hired as the Deputy Chief. [Id.]

No one filed a complaint with the PERB concerning Defendant Pitzer's decision not to promote Plaintiff Lewis or have IA investigate him for illegal wiretapping. [Id. at ¶ 16.]

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IV. DISCUSSION

A. Claim for Violation of Government Code § 3500, et seq.

Defendants contend that Plaintiffs' claim for a violation of the MMBA is not before the Court properly because they did not exhaust their administrative remedies. [Mot. at 8-9.] Defendants assert that Plaintiffs' request for mandamus relief is immaterial to the exhaustion issue. [Id. at 9 n.1.]

The MMBA states that public employees "shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations," and that "no public employee shall be subject to punitive action or denied promotion, or threatened with any such treatment, for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit." Cal. Gov't Code §§ 3502, 3502.1. Moreover, an employer "shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." Cal. Gov't Code § 3506.

A plaintiff must properly exhaust its administrative remedies before filing a claim for a violation of the

MMBA. See Coachella Valley Mosquito and Vector Control Dist. v. Cal. Pub. Employment Relations Bd., 35 Cal. 4th 1072, 1080-81 (2005), Leek v. Washington Unified Sch. Dist., 124 Cal. App. 3d 43, 47-48 (1981). California Government Code § 3509(b) states as follows:

> A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

Plaintiffs' Complaint alleges that Defendants "denied [Plaintiff] Lewis a promotion or threatened him with such treatment, for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit." [Compl. at ¶ 27.] This is conduct covered by the MMBA, and the PERB has exclusive initial jurisdiction of this claim.

Plaintiffs' failure to file a complaint with the PERB means they failed to exhaust their administrative remedies. Hence, this claim is not before the Court properly.[3]

B. Claims for Violations of the Public Safety Officers Procedural Bill of Rights Act, California Government Code § 3300, et seq., and California Labor Code §§ 1101, 1102, and 1102.5

Defendants argue that Plaintiffs' claims for violations of the Public Safety Officers Procedural Bill of Rights Act ("PSOPBRA"), and California Labor Code §§ 1101, 1102, and 1102.5 are preempted by the MMBA because the claims are premised on the same conduct as Plaintiffs' claim for a violation of the MMBA. [Mot. at 10, 13, 15-16.] Defendants argue that since the underlying conduct on which the suit is based falls under the exclusive jurisdiction of the PERB, Plaintiffs' claims are not properly before the Court. [Mot. at 10-16.]

The preemptive reach of the PERB's exclusive initial jurisdiction is defined by the same principles as those in the National Labor Relations Act ("NLRA"). El Rancho

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[3] California Government Code § 3511 does not apply here because Plaintiff Lewis is not a peace officer as defined in California Penal Code § 830.1. It is immaterial that Plaintiff Lewis might be considered a "peace officer" for other purposes.

Unified Sch. Dist. v. Nat'l Educ. Assn., 33 Cal. 3d 946, 953 (1983). Pursuant to the NLRA, the National Labor Relations Board has "exclusive jurisdiction over activities arguably protected or prohibited by the NLRA." Id. (citing San Diego Unions v. Garmon, 359 U.S. 236, 244-245 (1959)).

Similarly, when a claim arguably can be considered to fall within the scope of the PERB, a plaintiff must file it with the PERB initially. Personnel Com. v. Barstow Unified Sch. Dist., 43 Cal. App. 4th 871, 885-86 (1996) ("PERB's exclusive jurisdiction is not limited to cases in which it is clear that an EERA violation is involved. Rather, '[i]n applying section 3541.5 to situations dealing with employment disputes, courts have permitted [the PERB] to retain exclusive jurisdiction in order to resolve disputes which arguably could give rise to an unfair practice claim.'").[4] "[W]here the only question is PERB's jurisdiction, what matters is whether the underlying conduct on which the suit is based - however described in the complaint - may fall within PERB's exclusive jurisdiction." El Rancho Unified Sch. Dist., 33 Cal. 3d at 954 n.13; Link v. Antioch Unified Sch.

[4] The MMBA has been construed as part of a larger system of laws regulating public employment relations under the initial jurisdiction of the PERB, including the EERA. Coachella Valley Mosquito and Vector Control Dist., 35 Cal. 4th at 1089.

Dist., 142 Cal. App. 3d 765, 769 (1983) ("Looking beyond the constitutional label given to plaintiffs' grievances herein the substance of conduct complained of may also constitute unfair practices which arguably could be resolved by a PERB ruling. . . . [T]he Legislature intended that the PERB exercise initial jurisdiction over those nominal constitutional violations."). A court should "seek to avoid conflicting adjudications which may interfere with [a labor] board's ability to carry out its statutory role, yet to permit court action when the board cannot provide a full and effective remedy." El Rancho Unified Sch. Dist., 33 Cal. 3d at 960-61.

A court cannot "grant relief against an unfair practice without deferring to the exclusive jurisdiction of the [PERB]." Los Angeles Council of Sch. Nurses v. Los Angeles Unified Sch. Dist., 113 Cal. App. 3d 666, 671 (1980). Referring cases to the PERB that are arguably within its jurisdiction "promote[s] the Legislature's purpose in creating an expert administrative body whose responsibility it is to develop and apply a comprehensive, consistent scheme regulating public employer-employee relations." Link, 142 Cal. App. at 769.

Here, Plaintiffs' claims for violations of the PSOPBRA and the Labor Code have the same factual basis as

their claim for a violation of the MMBA, i.e., Defendants passed over Plaintiff Lewis for a promotion because of his activities in the union.[5] [Compl. at ¶¶ 38, 43, 51, 56, 62, 67.][6] As discussed in Section IV.A, above, this is conduct protected by the MMBA. Hence, these claims fall within the PERB's exclusive initial jurisdiction and should have been filed with the PERB; if Plaintiffs' MMBA claim was filed with the PERB and the other claims were permitted to continue here, there would be a risk of conflicting adjudications. El Rancho Unified Sch. Dist., 33 Cal. 3d at 960-61.

C. Plaintiff Lewis's Claim Pursuant to 42 U.S.C. § 1983 against Defendant Pitzer

Defendants contend that Plaintiff Lewis has not presented evidence to create a triable issue of fact concerning the issue of pretext. [Mot. at 16.] Defendants argue that they have presented evidence that Defendant Pitzer made a non-retaliatory decision to promote Moon because he was better qualified. [Id. at 17.]

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[5] While it is unlikely that Plaintiffs' claim for a violation of the whistle blower statute depends on Plaintiff Lewis's union activity, Plaintiffs included this alleged activity in support of this claim. [Compl. at ¶ 51.] Accordingly, this claim is subject to the above analysis even though the alleged union activity is likely immaterial.

[6] Additionally, in Plaintiffs' Complaint, the factual allegations are titled as factual allegations for all causes of action.

Plaintiff Lewis alleges that Defendants violated the First and Fourteenth Amendments and the privileges and immunities clause. [Compl. at ¶¶ 74-81.]

Defendants incorrectly apply the three-stage burden shifting formula used in Title VII cases. [Mot. at 16 (citing McDonnell Douglas v. Green, 411 U.S. 792 (1973)).] Plaintiff Lewis has not alleged a Title VII claim in his Complaint; his § 1983 claim is brought pursuant to the First and Fourteenth Amendments and the privileges and immunities clause. [Compl. at ¶¶ 74-81.] That this case involves employment related issues does not mean that the Title VII standards apply. Each of the constitutional violations alleged by Plaintiff Lewis is governed by well-established standards and it is these standards that should have been analyzed here.

Defendants cite St. Mary's Honor Center v. Hicks, 509 U.S. 502, 504 (1993) and White v. Washington Public Power Supply System, 692 F.2d 1286, 1288-90 (9th Cir. 1982) to support the proposition that the McDonnell Douglas framework applies in § 1983 cases; however, such reliance is unfounded. [Mot. at 16.] While these cases involve Title VII claims and § 1983 claims, the McDonnell Douglas framework was discussed in reference to the Title VII claim only. Hicks, 509 U.S. at 504; White, 692 F.2d at 1288-90.

Defendants' application of the wrong legal standards to Plaintiff Lewis's § 1983 claim against Defendant Pitzer is fatal to their Motion; they have not satisfied their initial burden of demonstrating a lack of genuine issues of material fact concerning Plaintiff Lewis's § 1983 claim.

D. Claim against Defendant City pursuant to § 1983

Defendants contend that Defendant Pitzer's decisions could be reviewed by Defendant City and that he was not an official with final policy-making authority on Defendant City's employment policies. [Mot. at 23.]

The Supreme Court has made clear that a municipality may not be held liable for the constitutional torts of its employees under a respondeat superior theory. See Monell v. Dep't of Soc. Serv., 436 U.S. 658, 691 (1978). A plaintiff in a § 1983 case can establish municipal liability in one of three ways. See Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992). "First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity." Id. (internal quotations omitted) (citing Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989); Monell, 436 U.S. at 690-91).

"Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with 'final policy-making authority' and that the challenged action itself constituted an act of official governmental policy." Gillette, 979 F.2d at 1346 (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986); McKinley v. City of Eloy, 705 F.2d 1110, 1116 (9th Cir. 1983)). "Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." Gillette, 979 F.2d at 1346-47 (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988); Hammond v. County of Madera, 859 F.2d 797, 801-02 (9th Cir. 1988)).

That a fire chief has the discretionary authority to hire and fire personnel, but does not have the authority to establish employment policies, is insufficient to establish that he or she is an official with final policy-making authority. Gillette v. Delmore, 979 F.2d 1342, 1350 (9th Cir. 1992) ("Municipal liability could be imposed on the basis of Hall's actions only if he was responsible for establishing the City's employment policy.")

Defendant Pitzer's decisions concerning employment related issues are subject to the review of the Civil

Service Board and, in some circumstances, Plaintiff Union. [Pitzer Decl. at ¶ 2.] Further, Defendant Pitzer has no authority to set personnel policies; this responsibility is vested in the City Council. [Id.]

On account of Plaintiffs' failure to file timely Opposition, no evidence has been presented to rebut Defendants' evidence that Defendant Pitzer was not an official with final policy-making authority. Further, there is no evidence in the record that Defendant Pitzer's actions were pursuant to a custom, policy, or practice of the City or was ratified by a person with final policy-making authority.

Accordingly, Defendants have established that there are no genuine issues of material fact concerning Defendant City's liability under § 1983.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion is granted in part and denied in part. The only remaining claim in this case is Plaintiff Lewis's claim against Defendant Pitzer for a violation of the First and Fourteenth Amendments and the privileges and immunities clause. In light of the Court's ruling concerning Plaintiffs' state law claims, Plaintiffs' Motion for a Writ of Mandate filed on April 26, 2006, is not properly

before the Court. Thus, the Court hereby denies the Motion for Writ of Mandate.

Dated: May 25, 2006

VIRGINIA A. PHILLIPS
United States District Judge