



LAW UPDATE LABOR AND EMPLOYMENT

PHONE: (661) 636-4830 • FAX: (661) 636-4843
E-mail: sls@kern.org • www.schoolslegalservice.org

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WHEN MIGHT PAID ADMINISTRATIVE LEAVE CONSTITUTE AN ADVERSE EMPLOYMENT ACTION?

Clients often ask whether they are allowed to place an employee on paid administrative leave pending an investigation against the employee into allegations of misconduct. Typically, counsel have responded that there is no legal limitation against placing an employee on leave under these circumstances.¹ Indeed, placing the subject of an investigation on paid administrative leave is often a sound investigative practice used to protect the integrity of an ongoing investigation, protect the involved witnesses from retaliation, and protect the rights of the accused. Advice concerning paid administrative leave has been based on the idea that paid administrative leave is not an adverse employment action as the employee remains employed, continues to receive full compensation, and otherwise does not experience a substantial change in the terms and conditions of employment while on the leave.

However, recent case decisions have changed the landscape of paid administrative leave for California school employers. In *Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, a California Court of Appeal, reviewed whether placement of an employee on paid administrative leave could constitute an adverse employment action. Mary Anna Whitehall (Whitehall) was a social worker for the San Bernardino County Children and Family Services (CFS or the County). Following another social worker's investigation of a baby's death under suspicious circumstances and the placement of four older siblings in protective custody, Whitehall was assigned to investigate for the jurisdiction/disposition hearing. She gathered the pertinent evidence to present to the juvenile court, but the deputy director of CFS directed her to withhold certain photographs and to provide altered photographs to the court. Whitehall was worried that the court would have an inaccurate picture of the home. She provided the assigned deputy county counsel all the photographs obtained from the police and was shortly thereafter

¹ Counsel routinely also caution that defining the length of time, scope, and purpose of the leave at the outset has practical importance.

removed from the case and instructed not to discuss the case with the new assigned social worker investigator.

Whitehall then met with an attorney to discuss her potential liability. Six days after Whitehall and others filed a motion telling the court that CFS had perpetrated a fraud upon the court, Whitehall was placed on paid administrative leave for two months. The County claimed the leave was so that they could initiate an internal investigation regarding Whitehall's potential violation of County rules and policies barring disclosure of confidential information to unauthorized persons. After the two-month paid administrative leave, and two hearings, the County decided to terminate Whitehall, but she resigned in lieu of termination.

Whitehall thereafter filed a complaint against the County and CFS based on whistleblower liability and retaliation. In analyzing the case, the Court found that the County's act of placing Whitehall on paid administrative leave was in retaliation for her disclosure to the juvenile court of manipulation of evidence in a dependency case. The Court noted that the temporal proximity between Whitehall's report to the juvenile court and the County's placement of her on paid administrative leave reflected a direct connection. The Court held that the lower court correctly found that Whitehall had established an adverse employment action under the specific facts at issue.

Earlier, in *Dahlia v. Rodriguez* (2013) 735 F.3d 1060, Burbank Police Department (BPD) detective Angelo Dahlia (Dahlia) sued the City of Burbank, the Chief of Police, and several other police officers based on allegations of 42 U.S.C. section 1983 First Amendment retaliation. Dahlia was assigned to assist in a robbery investigation following an armed robbery on December 28, 2007 at Porto's Bakery & Café in Burbank, California. During the investigation, he witnessed several instances of police violence and brutality against suspects. He complained three times to his immediate supervisor and was met with hostile responses. The unlawful behavior continued. Dahlia thereafter participated in investigations by BPD Internal Affairs and the Los Angeles Sheriff's Department (LASD) about the Porto's robbery investigation. During the LASD investigation, Dahlia disclosed misconduct, threats, intimidation and harassment by other BPD officers. Four days later Dahlia was placed on paid administrative leave pending discipline.

Later in his lawsuit filed in November 2009, Dahlia alleged that he was subjected to adverse employment actions as a result of his protected speech activities and that there was no legitimate justification for the adverse actions. At the trial court level, most of the defendants moved to dismiss the case for failure to state a claim. The District Court granted the motion to dismiss and found that Dahlia's Section 1983 claim was barred because (1) he spoke pursuant to

his official duties and thus was not constitutionally protected, and (2) placement on paid administrative leave was not an adverse employment action.

The Ninth Circuit Court of Appeals, following a rehearing en banc, reversed the lower court's decision and remanded the matter back to the lower court. The Court of Appeals held based on several factors that Dahlia's disclosures to LASD were protected by the First Amendment. Further, the Court held "under some circumstances, placement on administrative leave can constitute an adverse employment action." (*Dahlia v. Rodriguez* (2013) 735 F.3d 1060, 1078.) The Court found whether an employer's action is "reasonably likely to deter employees from engaging in protected activity" is the proper inquiry in determining whether an adverse employment action took place. (*Ibid.*) The Court explained that if Dahlia's assertions were proved, "[t]he inability to take a promotional exam, loss of pay and opportunities for investigative experience, as well as the general stigma resulting from placement on administrative leave appear 'reasonably likely to deter employees from engaging in protected activity.'" (*Id.* at 1079.) While the Ninth Circuit Court of Appeals did not set forth a bright line rule that paid administrative leave is an adverse employment action, it did find that in certain circumstances such as the retaliation case presented in *Dahlia*, paid administrative leave could constitute an adverse employment action.

These cases demonstrate that employers should review on a case-by-case basis each situation which may prompt placement of an employee on paid administrative leave. If the employee has recently complained (especially to an outside agency) or exercised his/her whistleblower rights, extreme caution should be used before making a decision to place the employee on leave. Additionally, if the employee will suffer any loss of pay (such as holiday pay), benefits, inability to participate in promotional examinations, or opportunities for experience, and stigma from the placement on paid administrative leave, a reviewing court may well determine the action to be an adverse employment action thus subjecting the employer to liability.²

Should you have any questions or concerns regarding this information, please contact our Labor and Employment practice group attorneys.

-Melissa H. Brown

² Careful attention should be paid to situations where an employee may experience credentialing ramifications as a result of a paid administrative leave. For example, employees serving on internship credentials may lose the required hours spent in a classroom, thus affecting their credential, if they are placed on paid administrative leave for a lengthy period of time.