Case Number S204221

IN THE SUPREME COURT OF CALIFORNIA

PARATRANSIT, INC.
Respondent,

V.

UNEMPLOYEMENT INSURANCE BOARD
Respondent,

CRAIG MEDEIROS
Petitioner and Real Party in Interest and Appellant.

After a decision of the Court of Appeal, Third Appellate District
Case No. C063863

Appeal from a Judgment of the Superior Court,
County of Sacramento
Hon. Timothy M. Frawley, Presiding
Case No. 34-2009-80000249

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner Craig Medeiros urges review of the appellate court's published decision because it conflicts with well established law regarding the analysis of employment insubordination cases and applies the wrong standard for a good faith error in judgment for purposes of Unemployment Insurance benefits. In its Answer, Respondent Paratransit, Inc. (Paratransit) claims that these issues are not implicated by the majority opinion. However, Paratransit's arguments are not based on how the appellate court actually analyzed this case. Moreover, Paratransit's argument that the terms of a collective bargaining agreement are essentially irrelevant to both (1) whether an employer's order is lawful and reasonable and (2) whether an employee's noncompliance is a good faith error in judgment are contrary to established law and present yet another reason that the majority opinion causes uncertainty, justifying Supreme Court review.

I. THE MAJORITY OPINION CREATES UNCERTAINTY BY FINDING INSUBORDINATION WITHOUT FIRST DECIDING WHETHER THE EMPLOYER'S ORDER WAS LAWFUL AND REASONABLE.

A. Paratransit Mischaracterizes The Majority Opinion's Analysis And Promotes Arguments Subverting The Existing Standard For Whether An Employer's Order Is Lawful And Reasonable.

Paratransit essentially concedes that the first question in an insubordination case should be whether the employer's order is lawful and reasonable.[1] (Respondent's Answer Brief to Petition for

[1] Paratransit relies on *Lacy v. California Unemployment Insurance Board* (1971) 17 Cal.App.3d 1128 to state that employees must comply with employer orders unless they impose new and

Review (Answer) at pp.3-4.) In fact, Paratransit states (twice) that the appellate court majority opinion concludes that the order is lawful and reasonable. (Answer at p.4.) Paratransit avers that the majority opinion's "red herring" is reliance upon the collective bargaining agreement (CBA) to determine whether its order was lawful and reasonable. (Answer at p.5.) Paratransit is wrong. Instead, the majority engaged in a new and unsupported method of analysis by concluding that the question of whether the order was lawful and reasonable was irrelevant because Mr. Medeiros would not have signed any document presented to him. In relevant part, the majority opinion states:

> [t]he question whether the disciplinary memorandum satisfied the requirements of the CBA is a red herring . . . . there is no reason to believe Claimant would have signed the document even if it had been in a form more in line with the requirements of the CBA . . . Thus the question here is not whether the Claimant was relieved of the requirement to sign the memo because it did not comply with the CBA. Claimant refused to sign 'anything' presented to him by the employer.

(*Paratransit, Inc. v. California Unemployment Insurance Board* (2012) 206 Cal.App.4th 1319, 1327.)

The majority leaves no doubt that it did not ask the question whether the order was lawful and reasonable because it concluded Mr. Medeiros would not have signed any document presented to

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unreasonable burdens. However, the governing unemployment insurance regulation, which was promulgated in 1980, years after *Lacy*, states misconduct only occurs for disobeying "the lawful and reasonable orders of the employer." (22 Cal.Code Regs. § 1256-36(b)(1).) Regardless of the standard, the majority opinion did not analyze the employer's order to sign the disciplinary memorandum as it was written to determine whether Mr. Medeiros had a duty to follow it.

him, regardless of its content. The majority's decision that it need not first analyze whether the employer's order was lawful and reasonable, and thus whether Mr. Medeiros had a duty to follow it, creates uncertainty not just in unemployment insurance law, but in all of employment law. (*See* Petition for Review (Petition) at pp. 2, 9-11.)

B. The Majority Opinion Causes Uncertainty With The New And Unsupported Claim That An Employee Must State The Legal Basis For Objecting To An Order.

Paratransit echos the majority opinion that whether its order violated the CBA is irrelevant because Mr. Medeiros did not state the disciplinary notice violated the CBA when he refused to sign it. (Answer at p.5, *Paratransit, id.*, 206 Cal.App.4th at p.1327.) Neither Paratransit nor the majority opinion cites authority for this proposition. In fact, several California courts have found no duty to follow an order found not to be lawful and reasonable when there is no indication that the employee stated a legal reason at the time of noncompliance. (*See e.g. Thornton v. Department of Human Resources Dev.* (1973) 32 Cal.App.3d 180, 186 [no reason given for refusal of employee to shave beard]; *Lacy, supra*, 17 Cal.App.3d 1128, 1133 [no reason given for employees refusal to train her new supervisor]; *Forstner v. City and County of Sacramento* (1966) 243 Cal.App.2d 625, 632.)

The Supreme Court in *Amador v. Unemployment Insurance Appeals Board* (1984) 35 Cal.3d 671, 680-81, stated the proper analysis for misconduct in this context is first whether the worker willfully refused a reasonable order and second whether that refusal was for good cause. In this framework established by the Supreme Court, the employee's subjective reason for refusal of the

employer's order is relevant only for good faith reason for noncompliance. Nothing requires the employee to state the reason for noncompliance as a condition of finding the order to be illegal or unreasonable.

In fact, a requirement for an employee to state the reason for noncompliance with the employer's order as a precondition to arguing that the order violates a CBA provision violates federal labor law. In *National Labor Relations Board v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 837, the United States Supreme Court held that an employee is not required to expressly refer to or cite a specific provision of the CBA in order to protect rights under the CBA. Mr. Medeiros articulated his concern that union did not want him to sign documents and that signing would be an admission. (*Paratransit, supra*, 206 Cal.App.4th at p. 1323, 1327.) Both of these concerns are reflected in the CBA section at issue that requires disciplinary notices state signing is not an admission of the truth of any statements in the notice. (*Id.* at p.1322 [quoting the CBA section at issue].) No more is needed.

The majority opinion's justification that Mr. Medeiros did not specifically invoke rights under the CBA thus causes additional uncertainty by being at odds with several California decisions and with federal labor law rights. Moreover, review is needed to settle this important issue because the majority's analysis would close the door to unemployment insurance for countless deserving unemployed persons and condone illegal employer behavior. Such cannot be the law. Supreme Court review is required to clarify and settle an employee's right to challenge illegal or unreasonable employer demands, even if they cannot state on the spot exactly why an employer's order is improper.

C. Paratransit's Interpretation Of Majority Opinion Creates Further Uncertainty By Announcing A New Standard That The Terms Of Collective Bargaining Agreements Are Irrelevant In Determining Whether An Employer Order Is Lawful And Reasonable.

Based on its claim that the majority opinion actually decided whether Paratransit's order was lawful and reasonable, Paratransit contends that the fact an employer's order violates a CBA is not a basis for finding that order to be illegal or unreasonable.[2] Paratransit goes as far as to claim the notion that an order that violates a CBA is not legal or reasonable is "novel" and unsupported by California authority (Answer at p.5.) To the extent the majority opinion implicates -- instead of evades -- this issue, Paratransit is wrong. *Moosa v. State Personnel Board* (2002) 102 Cal.App.4th 1379 directly supports the proposition that an order that violates a CBA is not lawful and reasonable. In *Moosa*, a professor was demoted for refusing to develop an improvement plan. Moosa argued that the order to develop an improvement plan violated the governing CBA. The Court of Appeal agreed that the order violated the CBA and stated " . . . the dean's directive was invalid as a matter of law

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[2] Paratransit describes its order as one which "does not precisely conform to the language of the CBA." (Answer at p.5.) However, Paratransit's order was far worse than a technical violation. The CBA requires disciplinary memoranda to state as a precondition to signing both that signing is as to receipt and that signing is not an admission of the truth of any allegations stated. (*Id.* at p.1322.) The disciplinary memorandum that Paratransit ordered Mr. Medeiros to sign was missing one of those two required elements, that signing was not an admission. Regardless of the characterization, Paratransit's Answer essentially concedes, as it must, that its order was at least inconsistent with the CBA. (Answer at p.5.)

because it was inconsistent with the terms of the collective bargaining agreement . . . ." (*Id.* at p.1381.)[3]

Paratransit claims *Moosa* does not apply because it involved a public employee discharged under the Education Code. But such distinction is without difference. The Court expressly disagreed with the idea that an order that violates a CBA could be lawful and reasonable. (*Id.* at p.1386.) The Court stated "Because the dean's order was inconsistent with the contract, Professor Moosa had no duty to obey that order." (*Id.*)[4] *Moosa* stands squarely for the proposition that an employee has no duty to obey an order that violates a governing CBA.

The California Unemployment Insurance Appeals Board (CUIAB) has also stated that the terms of a CBA are relevant in evaluating an employer's actions. In *Matter of Gertler*, P-B-321 (1951, issued 1976), the CUIAB determined that an Unemployment Insurance recipient had good cause to reject employment where the wage offered was lower than the wage required by the applicable CBA. *Matter of Gertler* further supports that the terms of a CBA are relevant to analysis of an employer's order.

Moreover, Paratransit does not contest that an employee does not have a duty to follow an employer's order that violates contractual terms. (*Mason v. Lyl Productions* (1968) 69 Cal.2d 79,

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[3] The fact that the majority did not address *Moosa*, a case from the same appellate district, also supports that the majority did not address whether Paratransit's order was lawful and reasonable. Presumably, if the majority had considered that issue, it would have addressed *Moosa* as authority directly on point.

[4] Paratransit alleges this analysis is inconsistent with *Lacy*. (Answer at p.5.) Paratransit is wrong because *Lacy* does not address an order that violates contract or law. (*Lacy*, *supra*, 17 Cal.App.3d at p.1132.)

84; *May v. New York Motion Picture Corp.* (1920) 45 Cal.App.396.) The terms of a CBA are binding on both the employer and the employee. (*Douglas Aircraft Corp. v. California Unemployment Insurance Appeals Board* (1960) 180 Cal.App.2d 636, 646.) Indeed, the CBA governs the terms of the employment relationship. (*J.I. Case Co. v. National Labor Relations Board* (1944) 321 U.S. 332, 335.) Individual employees are protected by CBAs and can enforce their terms. (*City Disposal Systems*, *supra*, 465 U.S. at p.832.) Because the CBA is a binding agreement governing employment, an employee has no duty to follow an employer's order that violates its terms. Whether the order Paratransit gave to Mr. Medeiros violated the CBA must therefore be the first question in determining whether he had a duty to follow the order. The majority's evasion of that first question was improper, and its analysis creates uncertainty in the law governing the employment relationship that justifies Supreme Court review.

II. PARATRANSIT TRIVIALIZES THE SIGNIFICANCE OF THE PHRASE 'SIGNATURE AS TO RECEIPT' THE MEANING OF WHICH IS AN IMPORTANT QUESTION OF LAW JUSTIFYING SUPREME COURT REVIEW

Paratransit avers that the meaning of the common legal phrase "signature as to receipt" is a "trivial dispute" that does not justify Supreme Court review. (Answer at pp. 7-9.) Paratransit is wrong for several reasons.

Paratransit first claims the meaning of "signature as to receipt" is trivial because the CBA does not mandate that exact language word for word. This argument is irrelevant. The question of the meaning of "signature as to receipt," the language that was in the 2008 disciplinary notice presented to Mr. Medeiros, transcends

the terms of the CBA. The majority opinion states that "signature as to receipt" and being told that signing is not an admission means, as a matter of law, that signing cannot be an admission.[5] (*Paratransit, supra*, 206 Cal.App.4th at p.1327.) The meaning of this common legal phrase that impacts all areas of contract is an important question of law.[6]

Paratransit next states that the meaning of "signature as to receipt" is "sufficiently clear so as not to suggest anything other than what it says." (Answer at p.8.) This makes no sense. Paratransit does not even attempt to state what "signature as to receipt" means and this case illustrates that it is not clear at all. When he was presented with the disciplinary memorandum and its "signature as to receipt" language, Mr. Medeiros stated he was concerned signing would be an admission. (*Paratransit, supra*, 206 Cal.App.4th at p.1327.) The union to which Mr. Medeiros belonged thought clarification was important enough to negotiate that the CBA not just require that disciplinary memoranda state signature as to receipt but to separately state that signing is not an admission. (*Id.* at p. 1322.) The dissenting opinion states that the statement "signature as to receipt" does not rule out an inference of an admission. (*Id.* at

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[5] As explained in the Petition, the employer's assurances regarding whether signing could be an admission would not apply to either third parties or criminal actions. (Petition at pp. 14-15.) As a result, at least on the facts of this case, the employer's assurances cannot be dispositive.

[6] Paratransit is also wrong about the requirements of the CBA because it mandates that disciplinary notices state " . . . the Vehicle Operator is only acknowledging receipt of said notice . . . . " (*Paratransit, id.*, 206 Cal.App.4th at p.1322.) Although the CBA does not mandate the exact language "signature as to receipt" the CBA requires disciplinary memoranda to state signature is only acknowledging receipt. (*Id.*)

p.1334 [dis. opn. of Blease, J.]) While Paratransit may think the meaning of "signature as to receipt" is clear, many others disagree.

Paratransit next claims that the majority determined Paratransit's demand to sign with the notation "signature as to receipt" was reasonable based on the totality of circumstances. This is a blatant misrepresentation of the majority opinion. The majority only discusses the language of the disciplinary memorandum in analyzing whether the order to sign was reasonable. (*Id.* at p.1327.) The majority discusses the surrounding circumstances only in the context of good faith error in judgment. (*Id.* at pp.1328-1333.) There is no fact-based determination based on the totality of the circumstances that the order to sign was reasonable.[7]

Relatedly, Paratransit claims that whether a particular statement constitutes an admission is a fact-based inquiry centered on the circumstances. (Answer at p.9.) Mr. Medeiros agrees and made the same argument in his Petition. (Petition at pp. 13-14.) But Paratransit misses the point. The question is not whether Mr. Medeiros signing of the disciplinary memorandum might have been an admission. The correct question is whether it was reasonable for Paratransit to demand that Mr. Medeiros sign a document that could be an admission. Given the admitted fact based nature of the inquiry, the majority's opinion that the order to sign was reasonable because signing could not be an admission as a matter of law is

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[7] One of the facts that Paratransit points to is that Mr. Medeiros signed a similar memorandum in 2004. (Answer at p.8.) Paratransit ignores that the 2004 disciplinary memorandum stated "Employee Signature (as to receipt only)" while the 2008 memorandum did not contain the word "only" to dispel the inference of an admission. (Petition for Review at p.14.)

wrong and creates an important issue of law that justifies Supreme Court review.

III. WHETHER THE EMPLOYER MUST PROVE INJURY TO ITS INTEREST IN ORDER TO PROVE MISCONDUCT FOR PURPOSES OF UNEMPLOYMENT INSURANCE BENEFITS WAS PROPERLY RAISED BELOW.

Paratransit does not substantively contest the ground for review that the majority's failure to consider whether Paratransit proved that Mr. Medeiros' actions injured its interest causes uncertainty. (Petition at pp. 15-16.) Instead, Paratransit claims the issue was not properly raised before the Court of Appeal because it was allegedly raised for the first time in Mr. Medeiros' Petition for Rehearing. Paratransit is wrong. The issue was raised by the appellate court during oral argument, and was decided in the dissenting opinion. (*Paratransit*, *supra*, 206 Cal.App.4th at pp. 1333-34 [dis. opn of Blease, J.].) When the Court of Appeals raises an issue, it is properly raised. (*Tsemetzin v. Coast Fed. Sav. & Loan Ass'n, Inc.* (1997) 57 Cal.App.4th 1334, 1341 n.6.)

In addition, the issue of whether Mr. Medeiros' conduct injured Paratransit's interest was raised in Mr. Medeiros' opening brief. (Appellant Craig Medeiros' Opening Brief at pp. 8-9, Exhibit A to Respondents' Request for Judicial Notice.)

Moreover, the rule that issues not previously raised should not be considered is discretionary. (*Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 723 n.17.) The issue was decided in the dissenting opinion and should be considered by the Supreme Court.

IV. THE MAJORITY OPINION CREATES UNCERTAINTY BY USING THE WRONG STANDARD FOR GOOD FAITH ERROR IN JUDGMENT FOR PURPOSES OF ELIGIBILITY FOR UNEMPLOYMENT INSURANCE

Paratransit quotes a lengthy portion of the majority opinion and claims that it articulates a general standard for good faith error in judgment. (Answer at p.12.) Paratransit gives no reason for this assertion. In fact, the section Paratransit quotes is the majority's justification of its good faith standard and the section Paratransit labels a "fragment of language" is the standard the majority used to evaluate good faith error in judgment. (Answer at p.13.)

The standard the majority opinion articulates for good faith error in judgment is when an employee "in good faith fails to recognize the employer's directive is reasonable and lawful or otherwise reasonably believes he is not required to comply . . . . " (*Paratransit, supra*, 206 Cal.App.4th at p.1328.) Paratransit acknowledges that this standard is how the majority framed the good faith issue. (Answer at p.13.) This is an improper framing of good faith error in judgment for two reasons.

First, the majority's standard limits consideration of good faith error in judgment to the terms the employer's order – whether the employee either fails to recognize the order is lawful and reasonable, or whether the employee has another reason to believe compliance is not required. However, for purposes of unemployment insurance, good faith error in judgment must " . . . take account of real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate causes that will bear the test of reason, just grounds for action, and always the elements of good faith." (*Amador, supra,*

35 Cal.3d at p.679 [citations omitted].) Under *Amador*, consideration of good faith error in judgment cannot be limited to the terms of an employer's order. The analysis must include all circumstances of the case.

In addition, reasons personal to the Unemployment Insurance applicant must be considered in determining good faith error in judgment. (*Norman v. Unemployment Insurance Appeals Board* (1983) 34 Cal.3d 1, 5; *Rabago v. Unemployment Insurance Appeals Board* (1978) 84 Cal.App.3d 200, 209.) By limiting analysis to the terms of the employer's order, the majority's standard improperly precludes consideration of Mr. Medeiros' personal circumstances, including that he was tired after a long day of work, he subjectively believed he was entitled to union representative and he was confused by the Paratransit representatives reference to an alleged lie on his employment application six years before. The correct standard of considering all of the circumstances would allow consideration of these facts. While the majority mentions these facts, the majority does not analyze them outside of consideration of terms of the order.[8]

Second, the analysis of good faith error in judgment must consider the circumstances from the worker's standpoint. (*Amador*, *supra*, 35 Cal.3d at p.683; *Sanchez v. California Unemployment Insurance Board* (1984) 36 Cal.3d 575, 587.) The majority's

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[8] Paratransit claims the majority did the proper analysis because it reviewed the facts surrounding good faith error in judgment *de novo*. (Answer at p.12.) This is both wrong and irrelevant. In fact, the majority deferred to actual and implied trial court findings regarding good faith error in judgment and did not do a *de novo* review. (*Paratransit*, *supra*, 206 Cal.App.4th 1329, 1331-32.) Moreover, the standard of review of factual conclusions is not at issue. The issue presented for review is the legal standard for good cause.

standard calls for an objective analysis of the order and whether the employee had objective reasons to disobey it, not a subjective analysis based on the worker's perspective. For example, the majority finds that Mr. Medeiros' belief that he was entitled to union representation to not be a good faith error in judgment because that belief was legally incorrect. (*Paratransit, supra* 206 Cal.App.4th at p.1330.) In doing so, the court did not consider whether Mr. Medeiros' belief that he was entitled to union representation was reasonable from his perspective. Such consideration would have included facts such as Mr. Medeiros was a bus driver, not a labor lawyer.

The majority also rejected that the reference to the alleged lie on Mr. Medeiros' employment application supported good faith error in judgment because it did not consider that the reference could in Mr. Medeiros' subjective understanding change the disciplinary meeting into an investigatory meeting. (*Id.* at p. 1332.)[9] This incorrect standard causes uncertainty that impacts all unemployment insurance misconduct cases. This uncertainty for a large, vulnerable population justifies Supreme Court review.

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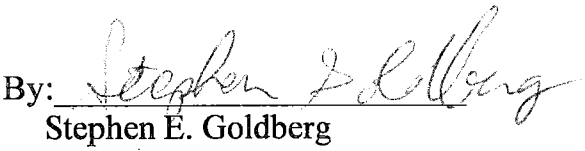
[9] Paratransit claims that any re-analysis would simply use the same standard the majority used. Not so. Indeed, a re-analysis of good faith error in judgment would not be limited to the terms of Paratransit's order: rather, it would be from Mr. Medeiros' subjective perspective. This different mode of analysis could certainly yield a different result.

CONCLUSION

The majority opinion creates uncertainty by announcing multiple new rules regarding analysis of both employee insubordination and eligibility for unemployment insurance. The new rules threaten the rights of all California employees to object to illegal and unreasonable employer orders, prevent enforcement of CBA rights, and limit eligibility for unemployment insurance for untold thousands of unemployed workers. The Court should grant review.

Dated: August 22, 2012 By: 

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WORD COUNT CERTIFICATION

I certify pursuant to California Rule of Court 8.204(c)(1) that the attached **Real Party in Interest and Appellant's Rehearing Petition** contains 3,178 **words**, as measured by the word court of the computer program used to prepare this brief.

Dated: August 22, 2012 By: _____

Stephen E. Goldberg
Attorney for Petitioner
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Craig Medeiros

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years old and not a party to the within action. My business address is 515 12th Street, Sacramento California 95814.

On August 22, 2012, I served the within REPLY TO ANSWER TO PETITION FOR REVIEW in *Paratransit, Inc. v. Unemployment Insurance Appeals Board; Craig Medeiros;* California Supreme Court Case Number S204221 [Third Appellate Dist. Ct. of Appeal Case No. C063863; Sacramento County Sup. Ct Case No. 34-2009-80000249-CU-WM-GDS] by placing a true copy enclosed in a sealed envelope, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22nd day of August 2012, at Sacramento, California.

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