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SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

PARATRANSIT, INC.
Respondent,

V.

UNEMPLOYMENT INSURANCE APPEALS BOARD
Respondent,

CRAIG MEDEIROS
Appellant and Real Party in Interest.

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

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

For thousands of California's workers, unemployment insurance benefits are all that separate them from poverty and homelessness while they search for work. The purpose of unemployment insurance is to ease the suffering caused by unemployment. In accordance with this purpose, courts have a mandate to interpret the Unemployment Insurance Code liberally to benefit the unemployed and the standards for eligibility are more generous than the standards for determining the legitimacy of discharge from employment.

A worker discharged from employment for misconduct is ineligible for unemployment insurance benefits. In this case, an employee, appellant Craig Medeiros, was found to have been terminated for misconduct for refusing to immediately sign a disciplinary notice that violated the terms of a Collective Bargaining Agreement ("CBA"). He did not sign the notice based on his concern that signing would be an admission and on his desire to speak to a union representative prior to complying with the employer's order to sign the notice at once. In so finding, the Court of Appeal majority applied the wrong standard for unemployment insurance eligibility, ignored established law, and failed to fulfill its duty to construe unemployment law to benefit unemployed workers.

Under long-standing precedent, determining whether an employee committed misconduct for not obeying an order requires analyzing whether the employer's order is lawful and reasonable. This includes determining of whether the order complies with the applicable employment contract. In the present case, the Court of Appeal majority refused to consider whether the employer's order to sign a disciplinary memorandum violated the plain language and intent of the CBA.

The Court of Appeal majority further erred by failing to consider whether Medeiros's action injured the employer, a requisite for finding misconduct. The majority also departed from well-established law evaluating whether Medeiros's action was a good faith error in judgment by using an objective standard based only on the terms of the employer's order. The court did not use the subjective standard required by this court's decision in *Amador v. California Unemployment Ins. Appeals Board* (1984) 35 Cal.3d 671, 683, which requires consideration of all of the circumstances Medeiros faced when he refused to immediately comply with the order to sign what he feared was an admission of wrongdoing.

The Court of Appeal's decision is based on incorrect standards for evaluating whether an employee committed misconduct and should be reversed.

II. STATEMENT OF ISSUES

1. May an employee be found to have committed misconduct for purposes of Unemployment Insurance benefits by insubordination without a finding that the employer's order is lawful and reasonable?
2. Can an employer's order to sign a disciplinary memorandum stating signature was "as to receipt" be lawful and reasonable when the collective bargaining agreement required that disciplinary memoranda state signing is "only acknowledging receipt of said notice and is not admitting to any fault or to the truth of any statements in the notice" and when the employee expresses concern that signing would be an admission?
3. May an employee be found to have committed misconduct for purposes of Unemployment Insurance benefits without a finding that the employee's conduct harmed the employer's interest?
4. May good faith error in judgment for the purposes of eligibility for Unemployment Insurance benefits be limited to only those situations where 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 ..." instead of considering all of the circumstances from the employee's perspective?

III. STATEMENT OF FACTS

This matter arose out of a writ of administrative mandate proceeding brought by Plaintiff and Respondent Paratransit, Inc., against the California Unemployment Insurance Appeals Board ("Board") to overturn the Board's decision granting unemployment benefits to Real Party in Interest and Appellant Craig Medeiros.

Medeiros was employed by Paratransit as a vehicle operator for approximately six years beginning in 2002. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2012) 206 Cal.App.4th 1319, 1322, review granted Sept. 26, 2012, S204221.) Medeiros was a union member. (*Ibid.*) His employment was governed by a CBA which required him to sign all disciplinary notices presented to him "provided that the notice states by signing, the Vehicle Operator is only acknowledging receipt of said notice and is not admitting to any fault or to the truth of any statements in the notice." (*Ibid.*)

On May 2, 2008 after he completed his shift, Medeiros was called into a meeting with Paratransit's representatives. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.*, *supra*, 206 Cal.App.4th at p. 1322.) Paratransit told Medeiros he was being disciplined based on a complaint made against him by a passenger. (*Ibid.*) During the meeting, Medeiros stated he disagreed with the allegations against him. (*Ibid.*) Medeiros asked that a union representative be present at the meeting. (*Ibid.*)

Medeiros also said he was tired after working a full day. (*Ibid.*) In addition, Medeiros said he was confused because the Paratransit representatives also discussed an incident about his hiring that occurred six years previously. (*Ibid.*)

The Paratransit representatives responded that Medeiros was not entitled to union representation. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1322.) Paratransit presented Medeiros with a memorandum stating he was being suspended for two days without pay because of the passenger's allegations. (*Ibid.*) Below the signature line, the disciplinary memorandum stated "Employee Signature as to Receipt." (*Id.* at p. 1323.)

In 2004, Mr. Medeiros had been given a disciplinary memorandum that he agreed to sign. (*Paratransit, Inc. v. Unemployment Insurance Appeals Bd., supra*, 206 Cal.App.4th at p. 1322.) Unlike the 2008 memorandum, the 2004 memorandum stated "Employee Signature (as to receipt *only*)." (*Id.* at p. 1323 [emphasis added].)

In the May 2, 2008 meeting, Medeiros told the Paratransit representatives that the union president had advised him not to sign documents that could lead to discipline without a union representative present. (*Paratransit v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1323.) He therefore did not want to sign anything without a union representative present. (*Ibid.*) He further stated that he

would not sign the disciplinary memorandum because he was concerned his signature could be an admission of the truth of the allegations. (*Id.* at pp. 1323, 1327; CT 473 [trial court finding].) Medeiros was also concerned that signing would mean he could not obtain union representation based on his understanding that other union members had been denied representation because they had signed disciplinary memoranda. (CT 473.)

During the meeting, the Paratransit representatives said Medeiros had to sign the disciplinary memorandum despite the fact that it did not state explicitly that signing was not an admission, as required by the CBA. (See *Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1323.) The representatives told Medeiros he would be fired if he did not immediately sign the document. (*Ibid.*) Although the Paratransit representatives stated that signing was not an admission of the allegations in the memorandum, Medeiros remained concerned that signing could be deemed an admission. (*Id.* at pp. 1323, 1327.) Accordingly, he "refused to sign the memo because he believed he should not sign anything without a union representative present." (*Id.* at p.1323.) He left the meeting saying he would consult with the union. (*Ibid.*) Paratransit immediately fired him. (*Ibid.*)

IV. PROCEDURAL HISTORY

Upon termination of his employment, Medeiros applied for unemployment benefits with the Employment Development Department ("EDD"), which denied his application. (See *Paratransit, Inc. v. Unemployment Insurance Appeals Bd., supra*, 206 Cal.App.4th at p. 1323.) Medeiros appealed, and the Administrative Law Judge ("ALJ") affirmed EDD's decision. (*Ibid.*) Mr. Medeiros then appealed to the Board, which overturned the ALJ's decision. The Board found Medeiros was discharged for reasons other than misconduct and was not disqualified from benefits because his failure to sign the disciplinary document was at most a simple mistake in light of "the admonition given by the union president not to sign, the lack of clarifying language near the signature line, and the denial of [his] request for union representation." (*Id.* at p. 1324.) Paratransit then filed a Petition for Administrative Mandamus, which was granted by the trial court. (*Id.* at p. 1324.)

On May 31, 2012, the Third Appellate District affirmed the superior court's order granting Paratransit's Petition. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1321.) Justice Blease dissented. (*Id.* at p. 1333.) On July 3, 2012, Medeiros's Petition for Rehearing was denied.

Mr. Medeiros timely petitioned for review on July 23, 2012. On September 26, 2012, this Court granted review.

V. STANDARD OF REVIEW

Where, as here, the trial court exercised its independent judgment on the challenged administrative action, the appellate standard of review is whether the findings are supported by "substantial, credible and competent evidence." (*Amador v. Unemployment Ins. Appeals Bd., supra,* 35 Cal.3d at p. 679.) However, "where the probative facts are not in dispute, and those facts clearly require a conclusion different from that reached by the trial court, . . . the latter's conclusions may be disregarded." (*Id.*)

Further, deference is not required where an improper legal standard has been applied. (*Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal.3d 575, 585 [holding trial court relied on flawed standard of good cause noting that cause was an issue of law].) Similarly, independent or de novo review is appropriate for questions of law. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799; see also *Lacy v. California Unemployment Ins. Appeals Bd.* (1971) 17 Cal.App.3d, 1128, 1134.) A question of law is one requiring the "application of a legal principle or rule to undisputed facts." (*Lacy, id.,* p. 1134.) The interpretation of a writing is a question of law, unless interpretation turns on conflicting extrinsic evidence presented to the lower court. (*Parsons v. Bristol Develop. Co.* (1965) 62 Cal.2d 861, 865–866; see also *Steiner v. Thaxton* (2010) 48 Cal.4th 411, 417 n.7.) In the present case,

there is no ambiguity in the CBA, and no extrinsic evidence about the CBA's meaning was introduced.

VI. STATUTORY FRAMEWORK

Pursuant to Unemployment Insurance Code Section 1256, an individual is disqualified from unemployment benefits if "he or she left his or her most recent work voluntarily without good cause or . . . he or she has been discharged for misconduct connected with his or her most recent work." (Unemp. Ins. Code § 1256.)

California regulations outline four elements that must be present to find misconduct:

- the claimant owed a material duty to the employer
- the claimant substantially breached that duty
- the breach was a "wanton or willful disregard of that duty"
- the breach disregarded "the employer's interest and injures or tends to injure the employer's interests." (22 Cal. Code Regs. § 1256-30(b).)

California courts have further specified that "good faith errors in judgment" are not misconduct. (*Maywood Glass Co. v. Stewart* (1959) 170 Cal.App.2d 719, 724.)

This Court has laid out the analytical framework where there is an allegation of misconduct for refusing to follow an employer's order as: 1) whether the order is lawful and reasonable; 2) whether the employee's

conduct evinces a willful or wanton disregard of the employer's interests that injures the employer's interests; and 3) whether the employee's actions were simply good faith errors in judgment. (*Amador v. Unemployment Ins. Appeals Bd., supra,* 35 Cal.3d at p. 678-79.)

VII. ARGUMENT

The Legislature has declared the purpose of unemployment insurance benefits is to reduce the suffering caused by unemployment. (Unempl. Ins. Code § 100.) In view of that objective, it is the duty of the courts to construe unemployment insurance law to benefit persons who are unemployed. (*Amador v. Unemployment Ins. Appeals Bd., supra,* 35 Cal.3d at p. 683; *Gibson v. Unemployment Ins. Appeals Bd.* (1973) 9 Cal.3d 494, 499.) The Court of Appeal majority breached that duty by disregarding the proper analysis with respect to whether an employee has engaged in misconduct for the purposes of eligibility for unemployment benefits. Specifically, the Court of Appeal erred by: 1) finding that Medeiros had a duty to obey an order to sign a disciplinary memorandum that violated the CBA and failed to protect him against the inference that signing admitted the truth of the allegations in the memorandum; 2) failing to require proof of injury to the employer from Medeiros's actions; and 3) applying the wrong standard to evaluate whether Medeiros simply made a good faith error in judgment.

A. THE COURT OF APPEAL ERRED IN FINDING MEDEIROS HAD A DUTY TO OBEY THE EMPLOYER'S UNLAWFUL AND UNREASONABLE ORDER.

1) An employee does not have a duty to obey an order that violates a CBA because such an order is unreasonable as a matter of law.

Pursuant to 22 Cal. Code Regs. Section 1256-30(b), in determining whether an employee committed misconduct, the first element that must be considered is whether the employee owed a material duty to the employer. Employees have a duty to comply with lawful and reasonable orders of the employer and it is misconduct to refuse to obey such an order without justification. (22 Cal. Code Regs. § 1256-36(b)(1); see *Yamaha Corp of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1,7 [administrative regulations are binding].) Employees do not have a duty to follow orders that are not lawful or reasonable. (22 Cal. Code Regs. § 1256-36(b)(1)(B-E).)

An employer who opposes an employee's application for unemployment insurance benefits on the ground of misconduct has the initial burden to establish that the employee violated a *reasonable* order. (*Amador v. Unemployment Ins. Appeals Bd., supra,* 35 Cal.3d at p. 680 n.7 [emphasis added].) Accordingly, the threshold question when the alleged misconduct is failure to obey an employer's order is whether that order was lawful and reasonable. Absent a reasonable order, there is no duty to comply and it is not misconduct to disobey such an order. (*Thornton v.*

Department of Human Resources Development (1973) 32 Cal.App.3d 180, 185; *Lacy v. California Unemployment Ins. Appeals Bd., supra,* 17 Cal.App.3d at p. 1132.)

Moreover, where there is an express employment contract or CBA, the reasonableness of the order depends on whether it is consistent with that contract. It is a well-settled principle that an employee has a duty to obey all reasonable orders of the employer that are "not inconsistent with the [employment] contract." (*May v. New York Motion Picture Corp.* (1920) 45 Cal.App. 396, 402-403 (1920); *Moosa v. State Personnel Board* (2002) 102 Cal.App.4th 1379, 1387.) In *May v. New York Motion Picture Corp,* the court evaluated a wrongful discharge claim of an actress terminated for disobeying an order to appear at the studio at a prescribed time. (*May, id.*, 45 Cal.App. at pp. 398-401.) The court established a two-step analysis, asking first whether or not the order is consistent with the contract, and then "if it is," whether the order was reasonable under the circumstances. (*Id.* at p.405.) Although *May* involved wrongful discharge, the Board has relied on it in evaluating insubordination for the purposes of determining eligibility for unemployment insurance benefits. (*Matter of Anderson* (1968) P-B-3 at p. 6; see *Pacific Legal Foundation v. California Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111 [Board view of statute or regulation it interprets entitled to great weight]; see also *Yamaha Corp. v. State Bd. Of Equalization, supra,* 19 Cal.4th at pp. 11-12

[administrative interpretive decisions are entitled to deference].) Thus, the initial inquiry under *May* is whether the order is consistent with an applicable employment contract.

This rule has likewise been applied to termination for not following an order that violated the terms of a CBA. (*Moosa v. State Personnel Bd., supra*, 102 Cal.App.4th at p. 1387.) In *Moosa*, a professor was demoted for refusing to comply with a dean's order to develop a teaching improvement plan. (*Id.* at p. 1383.) The Court of Appeal held that the professor had no duty as a matter of law to obey the order because it violated the terms of the CBA. (*Id.* at p.1387.)

Although *Moosa* involved discharge under the Education Code, the focus of the analysis was whether there is a duty to obey the order under general employment law principles and more specifically, whether the order exceeded the "normal *and reasonable* duties of his position." (*Moosa v. State Personnel Bd., supra,* 102 Cal.App.4th at p. 1385 [emphasis added].)[1] While neither *May* nor *Moosa* involved unemployment insurance

[1] The *Moosa* court rejected the argument that an employee's only remedy when an order is unreasonable or violates the employment contract or CBA is to obey and file a grievance. *Moosa* stated that the argument is unsupported by any California law. (*Moosa v. State Personnel Bd., supra,* 102 Cal.App.4th at pp. 1386-87.) The argument is also contrary to the settled rule that there is no duty to comply with an order that is inconsistent with a contract and to the principle that there can be good cause for noncompliance. (*Id.*; *accord Rabago v. Unemployment Ins. Appeals Bd.* (1978) 84 Cal.App.3d 200, 214 [mere existence of union grievance

claims, the rationale in both applies when, as here, the issues involve an employee's duty to obey and the reasonableness of an employer's order where an employment contract or CBA governs the terms of the relationship.

That rationale is further supported by other general labor law principles and Board decisions. The terms of a CBA are binding on both employers and employees. (*Douglas Aircraft Corp. v. California Unemployment Ins. Appeals Bd.* (1960) 180 Cal.App.2d 636, 646.) As such, CBAs govern the terms of 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. (*National Labor Relations Board v. City Disposal Systems* (1984) 465 U.S. 822, 832.)

In the same vein, the Board has recognized the relevance of the CBA when analyzing whether an employee has good cause to refuse offered work. (*Matter of Gertler* (1951) P-B-321 at pp.2-3.)[2] Thus, the CBA is relevant to the analysis of what duties employees owe and what

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procedure does not require employee to comply with employer's order as a condition of unemployment insurance eligibility].)

[2] In *Matter of Ludlow* (1976) P-B-190, the Board found misconduct where a union employee refused an order to perform duties he believed were outside of his job description. *Ludlow* is inapplicable and highly distinguishable. The Board in *Ludlow* did not mention a CBA in the decision nor was there any indication that the order was in any way inconsistent with the agreement. Here, the order violated the express terms of the collective bargaining agreement. As such, *Ludlow* is not instructive on this point.

orders employers may give not only in the context of employment law generally, but in the context of unemployment insurance as well.

To apply a different rationale in unemployment insurance cases evaluating alleged misconduct or to find the terms of a CBA irrelevant would put unemployment insurance law out of step with long-standing employment and labor law principles. This would harm workers throughout California by forcing them to submit to orders that breach protections provided by CBAs or face unemployment without benefits needed to house, feed, and clothe their families.

This outcome contravenes the public policy underlying the unemployment insurance program to liberally construe unemployment insurance law to protect employees. (See *Amador v. Unemployment Ins. Appeals Bd., supra,* 35 Cal.3d at pp. 678, 683.) Determining reasonableness of an employer's order requires consideration of whether the order is consistent with public policy. (*Cerberonics, Inc. v. Unemployment Ins. Appeals Bd.* (1984) 152 Cal.App.3d 172, 177 [citing *Syrek v. Cal. Unemployment Ins. Appeals Bd.* (1960) 54 Cal.2d 519, 529].) Requiring employees to submit to orders that violate CBAs on pain of ineligibility for unemployment insurance cannot pass this test.

2) The Court of Appeal improperly evaded the threshold issue of whether Medeiros had a duty to comply with the order to sign the disciplinary memorandum.

The Court of Appeal majority held that whether Paratransit's order to Medeiros to sign the disciplinary memorandum violated the CBA was irrelevant to the misconduct analysis. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1327.) Instead, the Court of Appeal majority focused on whether Medeiros's concerns about signing were reasonable. (*Ibid.*) Speculating that he would not have signed any document presented to him and relying upon Medeiros's failure to specifically assert in so many words that the order violated the CBA, the Court of Appeal majority determined it did not matter whether he had a duty under the collective bargaining agreement to comply with the order. (See *ibid.*) This rationale is problematic on three fronts.

First, the Court of Appeal majority dismissed as "a red herring" a critical issue: whether the order itself was lawful and reasonable in light of the employer's noncompliance with the CBA. (See *Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1327.) Rather, the Court of Appeal majority focused on whether Medeiros's reasons for disobeying (i.e. his concerns about making an admission) were reasonable. (*Ibid.*) However, as previously discussed, the proper analysis must begin with determining whether the order violated the CBA because if it did, it was unreasonable as a matter of law. Accordingly, Medeiros's

reasons for not signing would have become relevant only *if* Paratransit had first proven that the order was lawful and reasonable and specifically, that the order did not violate the CBA. The Court of Appeal majority missed this essential first step in the analysis.

Second, the Court of Appeal majority improperly relied upon speculation as to what would or would not have happened if Medeiros had been presented with a disciplinary memorandum that complied with the CBA. (See *Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1327.) In doing so, the Court of Appeal majority asked not whether the order actually given was lawful and reasonable, but whether Mr. Medeiros would have complied had the order been lawful and reasonable pursuant to the CBA. (*Ibid.*) The Court of Appeal majority cites no authority supporting such a novel proposition, which rests on nothing more than speculation and conjecture.

Moreover, if upheld, the Court of Appeal majority's analysis creates an unwieldy standard requiring courts to somehow divine what would have happened if the facts had been different, rather than evaluate the case based on the facts actually presented. In this case, one simply cannot know what would have happened had Paratransit presented a notice that complied with the CBA. The legal standard is not and should not be based on guesswork.

Third, contrary to law, the Court of Appeal majority opinion placed the burden on Medeiros to specifically state in so many words that the order

violated the CBA. (See *Paratransit, Inc. v. Unemployment Ins.Appeals Bd., supra*, 206 Cal.App.4th at p. 1327.) No California authority supports this claim. In fact, it is contrary to federal labor law.

In *National Labor Relations Board v. City Disposal Systems, Inc., supra,* 465 U.S. at p. 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. *City Disposal* means the Court of Appeal was wrong to hold that Mr. Medeiros should have specifically stated that the employer's order violated the CBA.

Moreover, such a standard is untenable. It would be contrary to public policy because it would immunize employers from violating CBAs or any other laws if their employees could not immediately and correctly cite chapter and verse why an order violated a CBA or other employment contract or law. By extension, such a requirement would prevent employees from contesting working conditions that violate health and safety rules only because they could not immediately cite an exact code section or regulation indicating why a particular condition is illegal. Few employees are lawyers and the ordinary worker cannot be expected to have the ability to cite the CBA or other law at any given moment.[3] Requiring a

[3] Indeed, very few lawyers are familiar with the multifarious statutes, regulations, precedential administrative decisions, Attorney General Opinions or other sources of law governing conditions of employment.

worker to cite chapter and verse of a CBA to avoid a finding of misconduct in refusing to obey an employer's order would eviscerate the purpose of unemployment insurance to assist persons unemployed "through no fault of their own . . . ." (*Amador v. Unemployment Ins. Appeals Bd., supra,* 35 Cal.3d at pp. 678, 683.)

Even if some statement of the reason for not signing were necessary, Medeiros articulated his concerns that the union did not want him to sign documents and that signing would be an admission of punishable conduct. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra,* 206 Cal.App.4th at pp. 1323, 1327.) Medeiros' concerns mirror the subject of the relevant CBA provision, which states clearly, unequivocally and categorically,

> *All disciplinary notices must be signed by a Vehicle Operator when presented to him or her provided that the notice states that by signing, the Vehicle Operator is only acknowledging receipt of said notice and is not admitting to any fault or to the truth of any statement in the notice.*

(*Id.* at p. 1322 [Court's italics].)

Nothing more was or should be required of Medeiros.

Even fewer can cite chapter and verse at a moment's notice when asked to determine whether a particular condition is legal or not.

3) Under the express terms of the CBA Medeiros did not have a duty to sign the disciplinary memorandum.

The disciplinary memorandum violates the plain language of the CBA. The CBA requires employees such as Mr. Medeiros to sign all disciplinary notices "*provided that* the notice *states* by signing, the Vehicle Operator is *only* acknowledging receipt of said notice *and* is not admitting to any fault or to the truth of any statements in the notice." (See *Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1322 [emphasis added].) Accordingly, the CBA imposes two independent requirements on such notices. They must "state" that the employee is: 1) "only acknowledging receipt," and 2) "not admitting to any fault or to the truth of any statements in the notice." (*Id.*)

The language of a contract alone governs its interpretation where it is "clear and explicit, and does not involve an absurdity." (Civ. Code §§ 1638, 1639.) Further, the words used in a contract must generally be understood in their ordinary and popular sense, which means that "if the meaning of a layperson would ascribe to contract language is not ambiguous," the court must apply that meaning. (Civ. Code § 1644; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-22, citing *Reserve Line Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807.)

Here, the language of the CBA is clear and explicit. The use of words "provided that" denotes that the duty to sign is conditional on the

remaining clauses. (See *Jacobsen v. Katzer* (Fed. Cir. 1998) 535 F.3d 1373, 1381.) The use of the word "states" means setting down in words. (See, e.g. Merriam-Webster Collegiate Dict. (11th Ed. 2003) <http:www.merriam-webster.com/dictionary/state> [as of Dec. 21, 2012]["state" means "to express the particulars of, especially in words"]; see generally *In Re Marriage of Bonds* (2000) 24 Cal.4th 1, 16 ["Courts frequently consult dictionaries to determine the usual meaning of words"].) The use of the word "and" between the two required statements evidences a distinction and unambiguously demands that both be included in the notice. (See *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861 [noting the ordinary usage of "and" is conjunctive and conditions "one of two conjoined requirements by the other, thereby causally linking them"].)

The disciplinary memorandum presented to Medeiros said only "Employee Signature as to Receipt" beneath the signature line. (See *Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1323.) The terse language of Paratransit's memorandum is insufficient to meet either of the CBA's two requirements. It fails to meet the first requirement that the notice "state" that Mr. Medeiros was

signing "only" to acknowledge receipt.[4] It wholly fails to meet the second requirement; it is devoid of any language even suggesting that, by signing the memorandum, Medeiros was "not admitting to any fault or to the truth of any statements" in it. In ignoring both requirements, the memorandum fails to include the protections the CBA expressly requires before an employee's duty to sign arises. Paratransit's order demanding Medeiros sign or lose his job directly violated the CBA.

4) Neither the language in the disciplinary memorandum nor Paratransit's verbal assurances that signing would not be an admission renders the order to sign lawful and reasonable.

Under the CBA, Paratransit agreed to provide employees with an explicit and clear assurance that they are protected from any inference of an admission of wrongdoing when signing disciplinary memoranda. Paratransit's demand that Medeiros sign the memorandum that lacked that protective provision breached the CBA.

Nevertheless, the Court of Appeal majority dismissed Medeiros's concerns that signing could be deemed an admission. The majority held that the language in the memorandum "Employee Signature as to Receipt" combined with Paratransit's verbal assurance that signing would not be deemed an admission alleviated any concern that signing could be an

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[4] Notably, the disciplinary memorandum given to Medeiros in 2004 did say that sign signing was acknowledging "only" as to receipt. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra,* 206 Cal.App.4th at p.1323.)

admission. (See *Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1327.) On that basis, the majority determined that ordering Medeiros to sign was reasonable. (*Ibid.*) That reasoning is flawed and should be rejected.

a. The language in the disciplinary memorandum does not foreclose the potential that signing might be deemed an admission.

The fundamental problem with the language used in the disciplinary memorandum is that it fails to protect employees from an inference of admission. As aptly put by Justice Blease in his dissent, "the explicit written notice required by the collective bargaining provision is there for a reason, to negate any adverse inference, an inference not ruled out by the statement 'Employee Signature as to Receipt.'" (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1334 [dis.opn. of Blease, J.].)

The majority opinion cites no authority for the proposition that signing could not be used as an admission or that the language of the memorandum would provide Medeiros protection from any inference that, in signing it, he admitted its allegations.

The definition of an admission is broad. "An 'admission' is a statement, oral or written, suggesting *any inference* as to any fact in issue, or relevant or deemed to be relevant, to any such fact, made by or on behalf of any party to any proceeding." (*Pendell v. Westland Life Ins. Co.* (1950)

95 Cal.App.2d 766, 776 [emphasis added].) Additionally, even a failure to deny an allegation can constitute an admission. (*Nungaray v. Pleasant Val. Lima Bean Growers & Warehouse Ass'n* (1956) 142 Cal.App.2d 653, 666.) Signing "as to receipt" does not explicitly deny the allegations in the memorandum.

Moreover, the fact Medeiros signed the memorandum without the assurance that he was not admitting wrongdoing, as the CBA requires, could conceivably be used against him. Why would he sign the memorandum without the protective language the CBA required Paratransit to include unless he was admitting its allegations, or at least willing to have it used against him as an admission? Likewise, the fact that the previous memorandum Mr. Medeiros signed provided that he was signing "only" as to receipt could also be contrasted with the current memorandum to suggest that by signing it he was admitting its allegations or at least willing to have it used against him as an admission. (See *Paratransit, Inc. v. Unemployment Ins. Appeals Bd.*, *supra*, 206 Cal.App.4th at p. 1323.)

Contrary to the trial court's view, signing as to the receipt and the mandatory "no admission" clause are not "two sides of the same coin." (CT 476.) Signing without the express assurance that this does not constitute an admission does not give the employee the protection the CBA requires against use of the signed document for exactly that purpose. The CBA requires disciplinary memoranda to have two elements. The no

admission element was completely missing. The fact that both elements were expressly required by the CBA means that they cannot be equivalent and that the "as to receipt" language cannot serve as a substitute for the no admission requirement. (Cf. *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 197 [requiring written instrument directly express parties intention that agreement reached in mediation be enforceable or binding, and holding that intention cannot be implied, even when statute allows intention to be expressed by "words to that effect"].)

Moreover, as explained above, the memorandum did not meet even the first so called "side of the coin" because it did not specify that signature was *only* as to receipt. The language in the memorandum did not foreclose the possibility that Mr. Medeiros' signature could be deemed an admission.

b. Paratransit's verbal assurance that signing was not an admission is not an adequate substitute for an express written protection.

The Court of Appeal majority's reliance on the employer's verbal assurances that signing would not be an admission is misplaced. Whether or not Medeiros's signature could be used as an admission was not within the sole province of the employer. Medeiros's uncontradicted testimony is that he had learned that the union refused to represent members who had signed disciplinary memorandums. (CT 473 [trial court findings].)

Further, Paratransit has no control over use of the memorandum as an admission by others, such as a plaintiff in a civil suit or criminal prosecutor

seeking to prove the allegations against him in the memorandum. Under such circumstances, Paratransit's verbal assurances are meaningless because the employer has no power over third parties. In addition, this Court has stated that employees are not always required to invariably trust their employer. (*Amador v. Unemployment Ins. Appeals Bd., supra*, 35 Cal.3d at p. 683.) Therefore, Paratransit's undocumented verbal assurances do not provide Medeiros the protection of the explicit statement the CBA requires disclaiming fault and truth of the statements in the memorandum.

B.THE COURT OF APPEAL ERRED BY NOT REQUIRING PROOF OF INJURY TO THE EMPLOYER PRIOR TO FINDING MISCONDUCT.

1) The issue of whether misconduct requires the employer must prove injury to its interests was raised below.

The issue of whether the employer must prove injury to its interest in order to prove misconduct was raised below. The issue was raised by the appellate court during oral argument. The issue was mentioned in Mederios's opening brief. (Appellant Craig Medeiros' Opening Brief at pp. 8-9.) The Court of Appeal dissent adjudicated the issue. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at pp. 1333-34 [dis. opn of Blease, J.].) When the Court of Appeal 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.)

Moreover, whether the employer must prove injury to its interest for insubordination to constitute misconduct is a question of law on settled facts which can be raised on appeal. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654 n.3 [citations omitted].) "It is settled that a change in theory is permitted on appeal when 'a question of law only is presented on the facts appearing in the record . . . .'" (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [citationsl omitted].) This question does not involve factual determinations. It only involves the legal question whether as a general principle proof of injury to the employer's interest is an element of misconduct due to insubordination. It can therefore be raised on appeal.

Furthermore, 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 raised by the Court of Appeal, decided in the dissenting opinion, and should be considered by this Court.

2) Finding misconduct due to insubordination requires the employer to prove injury to its interest.

Misconduct requires that the employee's actions damage the employer's interest. (*Maywood Glass Co. v. Stewart, supra*, 170 Cal.App.2d at p. 724.) The employer has the burden to prove injury to its interest. (*Perales v. Department of Human Resources Development* (1973) 32 Cal.App.3d 332, 340-41.) This Court, in *Amador v. Unemployment Ins. Appeals Bd., supra*, 35 Cal.3d at p.678, favorably cited *Maywood Glass* for

the proposition that "conduct must be . . . harmful to the employer's interest . . . . to constitute misconduct." (*Amador*, *id.* at pp. 678-79.) This is consistent with the Unemployment Insurance Code and regulations, which require that misconduct be conduct that "injures or tends to injure the employer's interest." (Unemp. Ins. Code § 1256; 22 Cal. Code Regs. § 1256-30(b).)

The Court of Appeal dissent stated there was no injury to the employer's interest from Mr. Medeiros' failure to sign the disciplinary memorandum. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at pp. 1333-34 [dis. opn. of Blease, J.].) The dissent reasoned that an unsigned disciplinary memorandum could not have injured the employer's interest because "the employer's interests were manifestly not involved in the violation of a union contract designed to protect the employee." (*Ibid.*) The Court of Appeal majority did not treat the issue. (See *id.* at pp. 1327-28.)

California courts twice have specifically held that an employee's violation of an employer's order was not misconduct because the employer did not prove injury to its interest. In *Steinberg v. Unemployment Ins. Appeals Bd.* (1978) 87 Cal.App.3d 582, the Court of Appeal held that the employee's violation of an order to speak to a coworker was not misconduct because the employer did not prove injury to its interest. There was no showing "that lack of coworker interaction really had any

deleterious effect on the company as a whole." (*Id.* at p. 587.) Consequently, violation of the order was not misconduct.

Similarly, in *Thornton v. Department of Human Resources Development, supra,* 32 Cal.App.3d 180, the Court of Appeal held that the employee's refusal to follow an order to shave his beard was not misconduct because the employer did not prove injury to its interest. The employer presented no evidence of detriment to its interest, and therefore did not meet its burden to prove misconduct. (*Id.* at p. 186.)

The Board has also held that even when violation of an employer's order is alleged, the employer must prove injury to its interest for the employee's failure to comply to be misconduct. In *Matter of McCoy* (1976) P-B-183, the employee was discharged for talking to other employees about starting a new company in violation of the employer's order to cease such conversations. The Board held that the employee did not commit misconduct because the employer did not prove injury to its interest.

> Although an employer may discharge an employee for failure to comply with a reasonable order designed to further the employer's business . . . the claimant's conduct was not such that it interfered with the orderly conduct of the employer's business or that the employer's order was in any way necessary to protect or preserve its business.

(*Id.*, at p.2; see also *Matter of Santos* (1970) P-B-66 at pp. 11-12 [finding misconduct because employer presented evidence that violation of personal appearance rules harmed business interests]; *Matter of Thaw* (1977) P-B-362 at p.7 [finding no misconduct because no evidence that claimant's grooming harmed business or that complaints about employee were related to grooming].)[5]

Moreover, the comments to the unemployment regulations state that the employer must prove harm to its interest. One comment gives an example of an employer talking to other employees about forming a new company: "C's failure to comply did not constitute misconduct due to insubordination, since C's activities did not disrupt the employer's operations." (22 Cal. Code Regs. § 1256-36, example 3.) The comments continue: "insubordination exists when an employee refuses to comply with a reasonable directive and ridicules or engages in a heated argument with the employer or the employer's representative in the presence of the general public, customers or other employees." (22 Cal. Code Regs. § 1256-36 example 6 comments.)

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[5] In two Board decisions, *Matter of Ludlow* (1976) P-B-190 and *Matter of Gant* (1978) P-B-400, the Board found misconduct because of disobedience of an order. Neither of those cases, however, raised or discussed whether injury to the employer was required. The Board directly addressed the issue in *McCoy, Santos* and *Thaw*.

In *Rowe v. Hansen* (1974) 41 Cal.App.3d 512, 523, the court held based on the specific facts of the case that an employee's insubordination justified denial of unemployment benefits without requiring proof of injury to the employer's interest. Plaintiff, a waitress, had been warned several times to cease wearing a sweater draped around her shoulders in violation of her employer's rule, which was intended to prevent food contamination. (*Id.* at p. 516.) She publically disobeyed a direct order to comply with the rule, raised her voice and insolently responded that "she was not her [supervisor's] child and didn't have to do what she told her." (*Id.* at p. 515.)

By contrast, there is no evidence that Medeiros raised his voice at Paratransit's representatives, used any profane language toward them, or did anything disrespectful of them. The discussion of the disciplinary memorandum was behind closed doors, after regular business hours. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1322.) And, unlike the waitress in *Rowe*, Medeiros did not directly challenge his employer's authority; he merely requested union assistance before signing the memorandum. (*Id.* at pp. 1323, 1327.)

Paratransit presented no evidence that the failure to sign the disciplinary memorandum caused any harm to its interest. Pararansit presented no evidence why its interests required Medeiros's immediate compliance with the order to sign the memorandum, instead of giving him time to consult with a union representative. Paratransit presented no

evidence of any prior acts of insubordination, or prior warnings for failure to follow a direct order.

As Justice Blease stated in his dissent, it was "perverse" that Paratransit could use the failure to sign as pretext to fire Medeiros, terminating his employment altogether, when the penalty for the alleged offense was only a two-day suspension. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at pp. 1333-34.) This unexplained disparity between the alleged offense and the severity of punishment for choosing not to immediately sign the memorandum lends further supports that the employer must present some evidence of injury to its interest in order to avoid unjustified denial of unemployment benefits. The dramatic factual difference between *Rowe* and this case illustrate why each case must be considered individually based upon the employer's proof of harm to its interest.

Finally, *Rowe's* statement that insubordination alone without proof of injury to the employer's interest was misconduct given the circumstances of that case is against the weight of judicial authority, contrary to Board precedent, contrary to unemployment insurance regulations and contrary to the purpose of the unemployment insurance program. The objective of the unemployment insurance program is to reduce the hardship of unemployment and eligibility is to be interpreted liberally to forward that goal. (*Gibson v. Unemployment Ins. Appeals Bd., supra*, 9 Cal.3d at p.

499.) Absent proven injury to the employer, an employee's conduct cannot be deemed willful and wanton to justify a finding of misconduct. Without injury to the employer, there cannot be fault on the employee's part.

Requiring evidence of harm to the employer's interest is not an onerous burden. Paratransit, for example, should have had no difficulty presenting evidence to show the reason, if any, why it was necessary for Medeiros to sign the disciplinary memorandum, and why he needed to sign it immediately without opportunity to consult with a union representative. (See e.g. *Thornton v. Department of Human Resources Development*, *supra*, 32 Cal.App.3d at p.186 [employer could have produced evidence that failure to shave was detrimental to employer's business or unsanitary]; *Steinberg v. Unemployment Ins. Appeals Bd.*, *supra*, 87 Cal.App.3d at p.587 [no misconduct because no evidence that lack of co-worker communication had any harmful effect on the company].) Paratransit's failure to show injury to its interest justifies reversal.

C. THE COURT OF APPEAL USED THE WRONG STANDARD TO EVALUATE WHETHER MEDEIROS'S ACTION WAS A GOOD FAITH ERROR IN JUDGMENT.

An employee does not commit misconduct if the employee's actions result from a good faith error in judgment. (*Amador v. Unemployment Ins. Appeals Bd.*, *supra*, 35 Cal.3d at pp. 678-79 [citations omitted].) This Court in *Amador* established that a good faith error in judgment can be

based on reasons personal to the employee and must be evaluated from the employee's subjective point of view. (*Id.* at p.679 [citations omitted].)

The Court of Appeal majority in this case used a different test, that a good faith error in judgment occurs only 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, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1328.) This test is wrong for two reasons: 1) it limits good faith error in judgment to the terms of the employer's order, and 2) it is an objective standard instead of the subjective standard from the employee's point of view that this Court held in *Amador* is to govern the determination of good faith.

1) The Court of Appeal erred by limiting analysis of good faith error in judgment to the terms of the employer's order.

Analysis of whether an employee's actions are a good faith error in judgment must include reasons personal to the employee. (*Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 5.) These personal reasons must include "real circumstances . . . palpable forces . . . [and] adequate excuses that will bear the test of reason." (*Amador v. Unemployment Ins. Appeals Bd., supra*, at pp. 678-79.)

The Court of Appeal majority, however, limited its analysis to the employee not recognizing that the employer's order was lawful and

reasonable or having another sound reason not to comply. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1328.) This formulation improperly narrows the analysis of good faith error in judgment by precluding consideration of circumstances outside the terms of the order itself. In practice, the Court of Appeal majority standard improperly limits good faith error in judgment to misunderstanding of the terms of the order itself.

The Court of Appeal majority's incorrect standard precluded consideration of facts outside of the scope of the employer's order, including that Mr. Medeiros was tired at the end of a long day of work, that he was confused by the employer's reference to an alleged lie six years earlier, and that he honestly and reasonably believed he was entitled to union representation. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at p. 1322.) While the Court of Appeal majority mentions these facts, it analyzes them using the incorrect standard, that is, it analyzes their direct relationship to the employer's order, instead of as other personal reasons that could also be good cause for not submitting. (See *id.* at pp. 1328-33.)

This improper narrowing of consideration of good cause is contrary to the requirement that unemployment insurance standards be liberally construed to benefit persons who are unemployed. (*Amador v. Unemployment Ins. Appeals Bd., supra,* at p. 683.) As explained in *Gibson*,

there is an "overriding legislative objective of establishing 'a system of unemployment insurance . . . *to reduce involuntary unemployment and the suffering caused thereby to a minimum.*'" (*Gibson v. Unemployment Ins. Appeals Bd.*, *supra*, 9 Cal. 3d at p. 499 [quoting Unemp. Ins. Code § 100][emphasis added].)

Failing to consider circumstances outside of the direct scope of the employer's order, such as the employee's state of mind and his desire to obtain outside assistance prior to making a decision about compliance with an order, defeats this statutory objective.

2) The Court of Appeal erred by analyzing good faith error in judgment from an objective standard instead of from the employee's subjective viewpoint.

This Court has consistently held that analysis of whether an employee's actions are a good faith error in judgment for purposes of unemployment insurance benefits must consider the circumstances from the worker's standpoint. (*Amador v. Unemployment Ins. Appeals Bd.*, *supra*, 35 Cal.3d at p. 683; *Sanchez v. California Unemployment Ins. Appeals Bd.*, *supra*, 36 Cal.3d at p. 587.) But, contrary to those holdings, the Court of Appeal majority's test objectively analyzes whether the employee failed to understand that compliance with the employer's order was required or had another reason to disobey.

The Court of Appeal majority held that Medeiros made no good faith error in judgment based on its objective determinations that he did not have

a right to union representation, that the employer's remarks about a six year old allegation could not be misleading, and that the Medeiros could not reasonably believe signing would be an admission. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd., supra*, 206 Cal.App.4th at pp. 1328-1333.) Each of these issues, however, involves consideration of legal concepts such as the right to representation under the National Labor Relations Act and what could be considered an admission under California evidence law. Medeiros was a bus driver, not a lawyer.

While objectively Medeiros may not have been entitled to union representation, the question is not so clear from the perspective of a bus driver uneducated in the fine points of labor relations law and the rules of evidence when confronted with a demand to sign a document and denied any opportunity for outside assistance. In addition, he faced two management employees alone at the end of a work day and his request to consult with his union was denied. Analysis of the circumstances from Medeiros' perspective, as this Court required in *Amador*, should lead to a different result.

In addition, there has been no disagreement that Medeiros was genuinely concerned that signing the memorandum would be an admission. Fear of admitting the truth of serious allegations that might be the basis of a lawsuit by the passenger involved in the alleged incident, and perhaps even a criminal prosecution, should certainly be considered in determining

whether he acted in good faith. As explained above, this subjective fear has a valid legal basis. But the Court of Appeal majority's improper objective standard meant this subjective concern was not weighed in determining whether Mr. Medeiros' choice to request union representation instead of immediately signing the memorandum was a good faith error in judgment. (See *Paratransit, supra*, 206 Cal.App.4th at p. 1329.)[6]

The unemployment insurance program uses a good faith standard to avoid the problem of punishing workers who do not have knowledge of such fine points of law by asking whether the worker's response was subjectively in good faith. This is the only standard consistent with the objective of liberally construing unemployment insurance benefits to reduce the hardship of unemployment. (*Rabago v. Unemployment Ins. Appeals Bd.* (1978) 84 Cal.App.3d 200, 209-210 [cited favorably in *Amador, supra,* at p. 683].) The Court of Appeal majority instead used an objective standard to find no good faith error in judgment. This error requires reversal.

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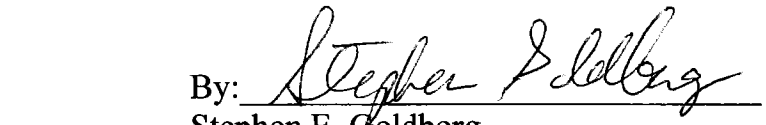
[6] The Court of Appeal majority's deference to the trial court compounds this problem instead of curing it because the trial court also improperly used an objective standard in determining good faith error in judgment, and particularly in determining whether the possibility that signing the memorandum could be an admission. (See Judgment, CT 502-504.)

VIII. CONCLUSION

The Court of Appeal majority erred by disregarding well settled principles and by applying new and improper legal standards that undermine the policy underlying the unemployment insurance program to the detriment of all California workers. Its decision should be reversed.

Dated: December 26, 2012

Respectfully submitted,
LEGAL SERVICES OF NORTHERN CALIFORNIA

By: 
Stephen E. Goldberg
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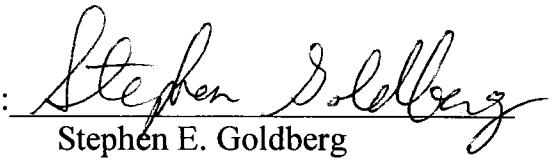
CERTIFICATION

I certify, pursuant to California Rule of Court 8.204(c)(1) that the attached APPELLANT'S OPENING BRIEF contains 8,734 words, as measured by the word count of the computer program used to prepare this brief.

Dated: December 26, 2012

LEGAL SERVICES OF NORTHERN CALIFORNIA

By: 
Stephen E. Goldberg

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 December 26, 2012, I served the within APPELLANT'S OPENING BRIEF 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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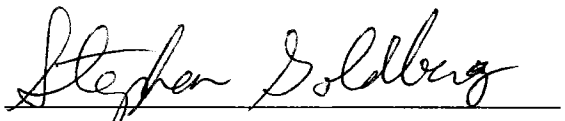
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 26th day of December 2012, at Sacramento, California.



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