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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

GAIL LAWRENCE et al., Plaintiffs and Appellants, v. HARTNELL COMMUNITY COLLEGE DISTRICT, Defendant and Respondent.	H035064 (Monterey County Super. Ct. Nos. M88730, M96271)

Appellants Gail Lawrence and Sharon Culver sought a writ of administrative mandamus (Code Civ. Proc., § 1085) in the trial court to compel their former employer, respondent Hartnell Community College District (the District), to reinstate them as executive assistants to the District's superintendent/president or alternatively, to conduct hearings on the propriety of their "demotions, involuntary transfers, and terminations." The court denied the petition, and appellants challenge that decision on appeal.

Appellants contend the court erred when it determined that their temporary reassignments were not "demotions" (Ed. Code, § 88001, subd. (d)),[1] and their eventual separations from employment were not terminations "for cause" (§ 88001, subd. (h)). We reject their contentions.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of section II.C.

[1] Further statutory references are to the Education Code unless otherwise noted.

I. Factual and Procedural Background

Appellants were nonunion permanent classified[2] employees of the District who worked as executive assistants to long-time superintendent/president Dr. Edward Valeau. Dr. Valeau resigned at the end of June 2007, and Dr. Phoebe Helm became interim superintendent/president.

She faced a challenging situation: The college was in imminent danger of losing its accreditation. "It was basically on probation because it had failed almost every standard. And so there were seven recommendations and two concerns that had to be corrected" in a relatively short time. "There were over 800 courses that needed to be reviewed . . . ," a task that would require "an extraordinary effort on the part of the faculty." Other issues required action by the board of trustees: "moving forward with an ethics statement and with a sanctions process . . . ." Implementation of shared governance was another issue. The entire process was complicated by a history of "significant tension or animosity" between the administration and the board and the fact that four of the seven board seats would be up for election that November.

Needing "to align the personnel to be able to accomplish the job" and wanting to begin "with a clean slate," Dr. Helm made various personnel changes. Those changes included reassigning appellants, effective July 25, 2007, to equivalent positions assisting the vice-presidents of academic affairs and student services. The assistants to those vice-presidents' who "worked in offices that mattered significantly in terms of the kind of content that the president's office would need in order to fully lead the accreditation process," were moved into the office of the superintendent/president.

The reassignments did not affect appellants' job classifications, titles, wages, or benefits. It was made clear to all involved that the reassignments were not performance-

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[2] "Classified" employees are those employed in certain nonacademic positions. (§§ 87001.5, 88003, 88076.)

related. It was also made clear that the moves were temporary and that all four reassignments would be reassessed in February 2008.

Appellants never reported to their new assignments. Instead, they obtained doctors' notes stating without qualification that they were unable to return to work. Notwithstanding the unqualified nature of their doctors' notes, however, appellants informed the District that they were at all times available to return to their *former* jobs in the office of the superintendent/president.

The District held appellants' new jobs open for more than five months. On December 21, 2007, the District informed appellants in writing that their entitlement to paid leave would be exhausted "as of January 9, 2008," that their most recent doctors' notes extended their "unable to work" status beyond that date, and that they would be released from employment and placed on the 39-month reemployment list unless they obtained written releases from their doctors and returned to work before January 9, 2008.

Appellants never submitted medical releases and never returned to work. On January 8, 2008, the District's board of trustees approved appellants' separations from employment and placed them on the 39-month reemployment list (§ 88195).

Appellants obtained a right-to-sue letter from the Department of Fair Employment and Housing and sued the District on January 23, 2008.[3] A year later, claiming they had been "demoted" without notice and hearings and then terminated "for cause," appellants petitioned for a writ of administrative mandamus in the trial court to compel the District to reinstate them to their former positions or alternatively, to conduct hearings on the propriety of their "demotions, involuntary transfers, and terminations." The parties

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[3] Although the third amended complaint is not included in the record on appeal, the trial court described it as alleging wrongful demotion and constructive discharge, discharge without due process, discharge in violation of Government Code section 12940, and discharge in violation of the whistleblower provisions of Labor Code section 1102.5.

stipulated to consolidate the actions for a bifurcated trial, with the writ petition issues to be tried first.

After a bench trial, the court denied the petition. The court concluded that since neither appellant had been reassigned to an "inferior position or status," the reassignments were not "demotions" (§ 88001, subd. (d)) or "disciplinary actions" (§ 88001, subd. (e)) triggering notice and hearing rights under section 88013, subdivision (c). Nor did the reassignments offend due process, because appellants enjoyed no property rights in their specific former assignments.

The court determined that appellants "were not terminated for cause, but because of their inability (per doctor notices) to return to work and all accrued sick leave had been exhausted." "While the motion before the Hartnell Board stated that the petitioners were terminated because of 'the inability, abandonment, and/or refusal to resume' their duties, actually, the Petitioners had 'abandoned and/or refused to resume' their newly assigned duties long before January 8, 200[8], and the Court so finds." The court concluded that because appellants' separations from employment were not "for cause," they were not "[d]isciplinary action[s]" (§ 88001, subd. (e)) triggering notice and hearing rights under section 88013, subdivision (c).

After a posttrial hearing on the remaining causes of action,[4] the court entered judgment for the District. Appellants filed a timely notice of appeal.

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[4] The parties stipulated that in lieu of proceeding on the remaining causes of action, the court could rule on them based on evidence presented at trial and appellants' offer of proof at a posttrial hearing. The court ruled in favor of the District, explaining that, given its determination that appellants' temporary reassignments were not demotions, "there is . . . a very serious failure of proof regarding the other causes of action. [¶] The Court does find . . . that there is insufficient evidence to sustain the plaintiffs' burden of proof. And the Court finds in favor of the defendants on each cause of action."

II. Discussion

A. Standard of Review

"In reviewing a trial court's judgment on a petition for writ of ordinary mandate, we apply the substantial evidence test to the trial court's factual findings." (*Kreeft v. City of Oakland* (1998) 68 Cal.App.4th 46, 53 (*Kreeft*). Under the substantial evidence test, "'"[w]e must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.] We may overturn the trial court's factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings. [Citation.]"'" (*Lake v. Reed* (1997) 16 Cal.4th 448, 457 (*Lake*).) "[W]e exercise our independent judgment on legal issues, such as the interpretation of statutory . . . provisions." (*Kreeft*, at p. 53.)

In this case we are called upon to interpret certain definitions in the Education Code. "'"The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. [Citation.] Ordinarily, the words of the statute provide the most reliable indication of legislative intent. [Citation.] When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. [Citations.]' [Citation.] '"When the language is susceptible of more than one reasonable interpretation . . . , we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part."' [Citation.]" (*People v. Jefferson* (1999) 21 Cal.4th 86, 94 (*Jefferson*).) "Using these extrinsic aids, we 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the

general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.'" (*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.)

B. The Temporary Reassignments Were Not "Demotions"

"At the heart of this case," appellants contend, is the trial court's too narrow construction of section 88001, which states, in subsection (d), that "'Demotion' means assignment to an inferior position or status without the employee's written voluntary consent." (§ 88001, subd. (d).) They claim the court erred in determining that their temporary reassignments "did not constitute 'demotions'—notwithstanding its simultaneous finding that the new positions conferred less 'prestige' than their original positions." Appellants claim that error engendered further error: the "mistaken" conclusion that since the temporary reassignments were not "demotions," appellants had not been subjected to "disciplinary action" and were therefore not entitled to pre-reassignment notice and hearings.

In urging their respective constructions of the statutory definition of "demotion" ("assignment to an inferior position or status without the employee's written voluntary consent"), neither side directly addresses the meaning of "position" or "status." (§ 88001, subd. (d).) Nor does either side explain the difference between the concepts each word connotes. In failing to squarely address the meaning of the particular words the Legislature chose, the parties run afoul of the principle that every word of a statute must be given "some significance, leaving no part useless or devoid of meaning." (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.) "In using two . . . different terms . . . the Legislature presumably intended to refer to two distinct concepts." (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55.) We will address them separately.

1. "Position"

The statute does not define "position," and its meaning has not been specifically addressed by the courts. Common dictionary definitions of "position" reveal that the

"usual, ordinary meaning" of the word (*In re Reeves* (2005) 35 Cal.4th 765, 770) is "a post of employment; a job," or more specifically, "the group of tasks and responsibilities making up the duties of an employee . . . ." (American Heritage College Dict. (3d ed. 1997) p. 1067; Webster's 3d New Internat. Dict. (1993) p. 1769.) Courts' general usage of the word in the case law are consistent with these definitions. (See *Barthuli v. Board of Trustees* (1977) 19 Cal.3d 717, 719 (*Barthuli*) ["Petitioner held the position of associate superintendent of business"]; *California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 337, fn. 4 ["Teachers, librarians, and counselors are examples of those in academic positions"]; *Kim v. Regents of the University of California* (2000) 80 Cal.App.4th 160, 166, fn. 2 ["The wage order does not specifically include administrative assistants, the most recent position held by Kim"].)

Viewing the word in the context of the statute as a whole (*Cummins v. Superior Court* (2005) 36 Cal.4th 478, 487) allows us to further refine what the Legislature intended by "position." The definition of "classification," for example, states that "'[c]lassification' means that each position in the classified service shall have a designated title, a regular minimum number of assigned hours per day, days per week, and months per year, a specific statement of the duties required to be performed by the employees in each such position, and the regular monthly salary ranges for each such position." (§ 88001, subd. (a).)

We think it follows that a position with a lower classification is an "inferior position" within the meaning of section 88001, subd. (d). (See, e.g., *Spanner v. Rancho Santiago Community College Dist.* (2004) 119 Cal.App.4th 584, 587-588 [chief custodian demoted to custodian].) But "assignment to an inferior position" must connote more than a reduction in classification; otherwise, the Legislature would have used the word "classification" instead of the word "position."

Appellants contend there can be a demotion in the *type* of position even where the salary remains the same. (See *Reed v. City Council of City of Roseville* (1943) 60

Cal.App.2d 628, 636 (*Reed*).) Relying on *Reed* and a variety of federal cases that do not address the meaning of "inferior position" or "demotion" under California's Education Code, they argue that an inferior position is one that has "a less distinguished title" or involves "significantly diminished material responsibilities."[5]

In our search for what the Legislature meant by "position" (and "inferior position"), we find *Reed* more helpful than the federal cases appellants cite.[6] In *Reed*, a

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[5] Appellants also argue that "significant changes in the nature and types of interactions the employee is likely to have with colleagues and others" can signify an inferior position. But the case they cite does not support their argument. In *Finot v. Pasadena City Bd. of Education* (1967) 250 Cal.App.2d 189 (*Finot*), the court held that a teacher's reassignment from classroom to home teaching, solely because he wore a beard, deprived him of a personal liberty interest protected by the Fourteenth Amendment. (*Finot*, at p. 202.) He suffered "a legally remediable detriment" because, although his rank and pay remained the same, his workload increased sevenfold, and he had only limited contact with other faculty members, whose "rather constant company" he had enjoyed in his previous position. (*Id.* at pp. 202-203.) *Finot* does not support the assertion that changes in the nature and types of interactions an employee is likely to have can, without more, signify an inferior position.

[6] The federal cases appellants cite do not advance their position because those cases apply different statutes to different factual situations. In *Crady v. Liberty Nat. Bank and Trust Co.* (7th Cir. 1993) 993 F.2d 132 (*Crady*), the court rejected a former assistant vice-president's Age Discrimination in Employment Act (ADEA) claim, noting that where salary and benefits remain the same, a change in employment "must be more disruptive than . . . an alteration of job responsibilities" and a title change from assistant vice-president to loan manager. (*Crady*, at p. 136.) In *Kocsis v. Multi-Care Management, Inc.* (6th Cir. 1996) 97 F.3d 876 (*Kocsis*), the court rejected an Americans with Disabilities Act (ADA) claim by a former nursing supervisor reassigned to the position of unit RN because of poor performance. She claimed she had been "demoted" because of her health problems to a position that was "much more physically demanding." (*Kocsis*, at pp. 879-880.) But her pay and benefits had remained the same, and her new position was "very similar, differing only in the number of patients and employees for whom [she] was responsible." (*Id.* at p. 879.) The Court of Appeals affirmed summary judgment for the employer, holding that the plaintiff had failed to establish a materially adverse employment action. (*Id.* at pp. 885 ["reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination cases"].) In analyzing the "materially adverse change" issue, the court reviewed a number of ADEA and Title VII cases that had rejected similar claims. (*Kocsis*, at pp.

housing and sanitation inspector challenged his reassignment to the position of special police officer, arguing that it violated the city personnel board's rule allowing transfers between civil service positions "'in the same or comparable class'" but disallowing transfers used to effectuate promotions or demotions. (*Reed, supra*, 60 Cal.App.2d at p. 630.) The trial court ordered the petitioner restored to his former position, and the Court of Appeal affirmed. The appellate court compared the qualifications and duties of the two positions, found them "markedly dissimilar," and concluded that the positions were "neither of the same nor of a comparable class." (*Reed*, at p. 635.) It was "obvious that the transfer complained of effected a demotion," because although both positions paid the same salary, "and it may appear that one qualified to perform the duties of housing and sanitation inspector is qualified to perform the duties of special police officer, yet *if the situation be reversed*, the lack of qualification of the latter to perform the duties of the former instantly appears, and compels the conclusion that petitioner's transfer did effect a demotion." (*Reed*, at pp. 635-636, italics added.)

In our view, *Reed* provides a useful metric for objectively assessing when reassignment to a position with the same classification, title,[7] salary, and benefits is an

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885-886; see, e.g., *Flaherty v. Gas Research Institute* (7th Cir. 1994) 31 F.3d 451, 457 [semantic change in title and a "bruised ego" not enough where pay and benefits remained the same].) In *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742 (*Burlington*), a Title VII case, the United States Supreme Court explained that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (*Burlington*, at p. 761.) "[I]n most cases, [it] inflicts direct economic harm." (*Id*. at p. 762.)

[7] Although appellants' briefs repeatedly characterize Lawrence's former title as "Senior Executive Assistant *to the President-Superintendent*" (or "Senior Executive Assistant *to the President*") and Culver's as "Executive Assistant *to the President-Superintendent*," and suggest their new titles were "Senior Executive Assistant *to the Vice President of Academic Affairs*" and "Executive Assistant *to the Vice President of Student Services*," we find substantial evidence in the record to support the conclusion that their titles (senior executive assistant for Lawrence and executive assistant for Culver) did not change. (Italics added.) Dr. Helm testified that appellants' titles

assignment to an "inferior position" or, in other words, a demotion. We think such situations will rarely be demotions. But if, after a comparison of the qualifications and/or duties of the two positions (A and B), it "instantly appears" that a person qualified to perform the duties of position A would not be qualified to perform the duties of position B, then position A is, in our view, the inferior one. (See *Reed*, *supra*, 60 Cal.App.2d at pp. 635-636.)

Here, the trial court in essence applied this analysis. After considering all of the evidence adduced at trial, including the written job descriptions, the court concluded that appellants had not been assigned to inferior positions. Our review of the record finds substantial evidence to support the court's determination.

Given the allegation in their writ petition that their former positions had been "filled by considerably younger *and less qualified employees*" and given their reliance on *Reed*, we would have expected appellants to adduce evidence at trial showing that the vice-presidents' assistants who assumed those positions had struggled to perform their duties in the office of the superintendent/president. (Italics added.) The record is devoid of any such evidence, which suggests that the positions were similar.

Dr. Helm testified that appellants would have done "very much the same kind of work" in their new positions. "[T]he work includes managing calendar, setting meetings, interaction with the public, handling anything as mundane as filing to making judgments about priorities for the person for whom you are working." The written job descriptions for the senior executive assistant and executive assistant positions, while not identical,

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remained the same; she did not agree with the statement that Lawrence's title was senior executive assistant *to the president*. The written job descriptions describe the positions of "executive assistant" and "senior executive assistant." As Lawrence herself explained, "I applied for the senior executive assistant position." "I was the senior executive assistant, and I worked in the Office of the President." Thus, we need not and do not determine under what circumstances a title change might connote an inferior position.

bolster Dr. Helm's statement: both describe standard secretarial and administrative support duties.

Appellants testified that the responsibilities of their former positions were "well above" the routine tasks they would have been relegated to in their new assignments working for District vice-presidents. When asked to identify specific "concrete differences" between their former and new assignments, however, they were unable to do so. Although Culver complained that in her new assignment, she would no longer "deal with vice-presidents on the campus and then you go to local, national, state, international levels," she conceded on cross-examination that the vice-presidents' assistants also dealt with local, state, and national government entities. Lawrence similarly conceded that assistants to the vice-presidents, just like assistants to the superintendent/president, interacted with deans, faculty, directors, and managers, and also had contact with boards of hospitals, agricultural companies, and the like. Appellants also acknowledged that the vice-presidents' assistants had duties above and beyond those expressly spelled out in the written job descriptions. Those tasks were encompassed by a general statement at the end of the job descriptions: "Perform related duties as assigned."

Given this evidence, the trial court could reasonably have discredited appellants' assertions that they had been reassigned to "inferior position[s]" that "involved significantly *less* responsibility."

2. "Status"

Appellants equate "status" with prestige. "'Inferior status,'" they assert, "clearly encompasses changes such as . . . a lower prestige position dealing with persons or groups lower in the College hierarchy." The District, on the other hand, suggests that "status" refers to classifications such as full- or part-time, permanent or at-will.

"Status" is not defined in the Education Code,[8] and we have found no case authority addressing its meaning. The American Heritage College Dictionary defines "status" as "1. Position relative to that of others; standing. 2. High standing; prestige." (American Heritage Dict. (3d ed. 1997) p. 1328.) Similarly, Webster's Third New International Dictionary defines "status" as "2 a: position or rank in relation to others (as in a social order, community, class, or profession) . . . b: relative rank in a hierarchy of prestige . . . ." (Webster's 3d New Internat. Dict. (1993) p. 2230.) Thus, common usage suggests that the word is reasonably susceptible of both interpretations the parties offer.

Where the plain language of a statute is ambiguous, we look to the context in which it appears. (*Jefferson*, *supra*, 21 Cal.4th at p. 94.) "Words used in an ordinary sense in one part of an enactment are to be construed in the same sense in another in the absence of express definition." (*Shorb v. Barkley* (1952) 108 Cal.App.2d 873, 877.) Here, the sense in which the Legislature uses "status" in other parts of the statute lends support to the District's interpretation of the word. In the section immediately preceding the definition of "demotion," for example, the statute provides that, "'Regular,' as used in the phrase 'regular classified employee,' or any similar phrase, refers to a classified employee who has *probationary or permanent* status." (§ 88001, subd. (c), italics added.) Other provisions refer to "paid status" (§§ 88002, subd. (a), 88165, 88197), "permanent status" (§§ 88005.1, 88008, 88079, 88091), "involuntary leave status" (§ 89536.1, subd. (b)), and "regular status in a full-time position" (§ 88076). Additionally, section 88120 distinguishes regular from probationary status. (§ 88120.) These usages lend support to the District's objective interpretation. We find nothing in the context of the statute to support appellants' subjective interpretation.

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[8] The identical definition of "demotion" ("assignment to an inferior position or status without the employee's written voluntary consent") appears in section 45101, but neither "demotion" nor "status" has been construed in connection with that statute. (§ 45101, subd. (d).)

We have examined the legislative history of section 88001, but it contains no clues to what the Legislature meant by "status." (*Jefferson, supra,* 21 Cal.4th at p. 94.) Therefore, we consider public policy. (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1084.) "[W]e apply 'reason, practicality, and common sense to the language at hand.' [Citation.] The words of the statute should be interpreted 'to make them workable and reasonable.' [Citation.] We will also consider the consequences that will flow from a particular statutory interpretation. [Citation.]" (*Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 583.).

Overwhelming public policy as well as practical considerations make it highly unlikely, in our view, that the Legislature intended to give "status" the subjective interpretation appellants advance here. As becomes immediately apparent, such a nebulous standard is no standard at all. Were we to adopt appellants' standard, any classified employee could demand notice and a hearing upon being transferred to a position he or she in some subjective sense deemed less prestigious, even if his or her classification, title, salary, and benefits remained the same. An assistant to the vice-president of business services could object to a lateral transfer to the office of the vice-president of student services, arguing, as Culver did, that working with students is far less prestigious than interacting with executives. How would a hearing officer or a court, faced with conflicting testimony from Dr. Helm that "[f]rom my perspective, the only business we're in is teaching and learning, and that always makes the Office of Instruction the most important office in the college," decide such a claim? Whose subjective viewpoint should prevail? The standard appellants urge would be unenforceable.

Appellants' standard would also deny school management the flexibility it needs to address staffing issues, replacing that flexibility with distracting and costly administrative procedures and litigation. It would have repercussions far beyond a school

district's executive offices, because the classified service "'includes custodians, bus drivers, cafeteria workers, clerical staff, some instructional aides, and other nonteaching and nonadministrative positions.'" (*Seymour v. Christiansen* (1991) 235 Cal.App.3d 1168, 1176-1177.) Since the identical definition of "demotion" appears in the sections governing classified employees of elementary and secondary school districts, it would affect those districts as well. (§§ 45101 et seq., 45101, subd. (d).) We do not believe the Legislature intended such an absurd interpretation.

These considerations lead us to conclude that the Legislature intended "status" to refer to objectively ascertainable indicators that establish an employee's standing relative to that of other employees. Examples include full-time versus part-time and confidential[9] versus non-confidential. This is not an exhaustive list, but it is sufficient to illustrate the stark difference between objectively ascertainable indicators of "status" and the highly subjective indicators that appellants urge us to adopt. We reject appellants' contention that "status" means prestige.

The cases on which appellants rely do not change our conclusion. In *Lynch v. McNamara* (D. Conn. 2004) 342 F.Supp.2d 59 (*Lynch*), the court held that a police sergeant did not have a protected property interest in remaining a member of Connecticut's Statewide Firearms Trafficking Task Force. Even assuming that he did, he was not deprived of that interest where he voluntarily left the task force before a disciplinary transfer and, after successfully grieving the discipline, obtained a settlement redesignating it as administrative. (*Id.* at p. 64.)

Lynch is not, as appellants claim, a case in which "the court determined whether there had been a change in 'rank' by comparing 'prestigiousness' of the employee's new duties with the 'prestigiousness' of his former duties." The *Lynch* decision did not turn

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[9] A "'[c]onfidential employee'" includes one "whose duties normally require access to confidential information that is used to contribute significantly to the development of management positions." (Gov. Code, § 3540.1, subd. (c).)

on prestige. As the court explained, "reassignments and transfers generally do not implicate a protected property interest for the purposes of due process, *unless accompanied by a loss in pay*." (*Lynch*, *supra*, 342 F.Supp.2d at pp. 65-66, italics added.) Not only was there no loss of pay in *Lynch*, the court continued, but the plaintiff retained "his rank of sergeant, his base pay, normal union steps in pay raises, and obtained even more prestigious positions after the transfer." (*Id*. at p. 64, fn. omitted.)

Appellants also cite *Kocsis*, asserting that "[r]eassignments have . . . been considered 'demotions' when they have involved a loss of '*prestige in [the employee's] position because of her working conditions or her title change.*'" But the plaintiff in that ADA case did not claim a loss of prestige. (*Kocsis*, *supra*, 97 F.3d at pp. 886-887.) *Kocsis* does not help appellants.

Appellants' reliance on Title VII cases is similarly misplaced. The fact that job prestige may be relevant in some circumstances does not mean it is relevant in entirely different circumstances. Even in the Title VII context, moreover, "an employee alleging a loss of prestige on account of a change in work assignments, without any tangible harm, will be outside the protection afforded by Congress in Title VII's anti-discrimination clause . . . ." (*Davis v. Town of Lake Park, Fla.* (11th Cir. 2001) 245 F.3d 1232, 1245; accord, *Maclin v. SBC Ameritech* (7th Cir. 2008) 520 F.3d 781, 789 ["a change in title that deprives an employee of prestige is insufficient if it lacks more substantive effect"].)

The trial court correctly concluded that appellants' reassignments were not "demotions" or "disciplinary actions" triggering notice and hearing rights.

3. Due Process

Appellants claim the District's failure to afford them pre-reassignment notice and hearings violated their rights to due process, since they had a property interest in their former positions. We disagree.

California's statutory scheme governing civil service employment gives state employees who attain "permanent" status a property interest in continued employment

that cannot be denied without due process. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206-207 (*Skelly*).) But as the United States Supreme Court has explained, "the range of interests protected by procedural due process is not infinite." (*Board of Regents v. Roth* (1972) 408 U.S. 564, 570 (*Roth*).) "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." (*Roth*, at p. 577; *Skelly*, at pp. 206-207.)

"Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Roth*, *supra*, 408 U.S. at p. 577; *Skelly*, *supra*, 15 Cal.3d at p. 207.) "It is the state . . . that defines the substantive nature of the property interest." (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1117 (*Coleman*).) "The statutory terms that define a particular right to employment determine its dimensions and scope." (*Id.* at p. 1114.)

The Education Code gave appellants a property interest in continued employment. (§§ 88121, 88001, subds. (d), (e), & (h).) "In a practical sense a permanent employee's property interest in continued employment embraces his current classification as well as his current salary." (*Ng v. State Personnel Bd.* (1977) 68 Cal.App.3d 600, 606.) That property interest is damaged by demotion as well as by dismissal: "The latter deprives him of the entire interest, the former of part." (*Ibid*.) Here, there was no loss of a property interest created by statute because, as we have already concluded, appellants' reassignments did not constitute "demotions" within the meaning of section 88001, subd. (d). Nor have appellants identified any other basis affording them the right to pre-reassignment notice and hearings. As the trial court expressly found, "[n]o Hartnell Board Policy provides a right to notice and a hearing for a transfer of a confidential

classified employee." Appellants do not challenge that finding on appeal. Moreover, "[i]t is well established that an employee enjoys no fundamental or vested right to continuation in a particular job assignment." (*Dobbins v. San Diego County Civil Service Com.* (1999) 75 Cal.App.4th 125, 131 (*Dobbins*).) Appellants' due process challenge fails.

C. Separations from Employment

Appellants contend they were terminated "for cause" without notice or hearings in violation of their due process rights, and the trial court erred when it concluded otherwise. The District responds that they were not terminated "for cause" but instead, pursuant to section 88195,[10] separated from employment and placed on the 39-month reemployment list once their available leave was exhausted.

1. Background

On December 21, 2007, the District informed appellants in writing that their entitlement to paid leave would be exhausted "as of January 9, 2008." The notices informed them that since their most recent doctors' notes extended beyond that date, appellants would be released from employment and placed on a 39-month reemployment list unless they obtained written releases from their doctors and returned to work before January 9, 2008.

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[10] Section 88195 provides in pertinent part that "[a] permanent employee of the classified service who has exhausted all entitlement to sick leave, vacation, compensatory overtime, or other available paid leave and who is absent because of nonindustrial accident or illness may be granted additional leave . . . . [¶] . . . [¶] If, at the conclusion of all leaves of absence, paid or unpaid, the employee is still unable to assume the duties of his or her position, the employee shall be placed on a reemployment list for a period of 39 months. [¶] At any time during the prescribed 39 months that the employee is able to assume the duties of his or her position, the employee shall be reemployed in the first vacancy in the classification of his or her previous assignment. The employee's reemployment shall take preference over all other applicants except those laid off for lack of work or funds . . . ." (§ 88195.)

Appellants never submitted medical releases and never returned to work. On January 8, 2008, the District's board of trustees approved appellants' separations from employment and placement on the 39-month reemployment list (§ 88195).

On February 14, 2008, Lawrence's husband wrote the District's director of human resources, with a copy to appellants' then counsel, Thomas Griffin: "I have been authorized by Sharon Culver and Gail Lawrence to contact you regarding apparent discrepancies in paid sick leave . . . ." Referring to documents that are not included in the record on appeal,[11] the letter questioned the District's calculation of appellants' differential leave in light of section 88196's "exclusive of any other paid leave" language and suggested that they had been "underpaid" by some unspecified amount. The letter asked the District to "review, recalculate, *and issue appropriate payments*" to appellants. (Italics added.)

In an unrelated case published in January 2009, the Court of Appeal examined the method of calculating leave that a number of school districts (including respondent District) had long used because, as the District explained, that method "put[] more money sooner into [absent employees'] pockets." That method combined an absent employee's 100 days of half-pay "differential leave" (§ 88196) with available vacation leave to keep the employee in full-pay status until his or her accrued time ran out. In *California State Employees Assn. v. Colton Joint Unified School Dist.* (2009) 170 Cal.App.4th 857 (*Colton*), the court held that this method contradicted the "exclusive of other paid leave" wording of section 45196.[12] (*Colton*, at p. 865.) "[V]acation leave and differential leave

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[11] The letter refers to "Page 6, Paragraph 11, of the Hartnell District's Confidential Terms and Conditions of Employment," to a "me-too" agreement that appellants unsuccessfully contended gave them the same or better benefits as union members received, and to a "2007-2008 Academic Calendar supplied by LouAnn [*sic*] Raras."

[12] Section 45196 applies to elementary and secondary school districts, while section 88196 applies to community college districts. The language of the two statutes is substantially the same.

should be deducted separately, or consecutively," the court explained, "possibly entitling [the employee] to additional days of differential leave after her sick leave and vacation leave were exhausted." (*Id*. at p. 863.)

Shortly before trial in July 2009, the District changed its calculation method to comply with *Colton*. As counsel for the District explained at closing argument, "Quite frankly, Your Honor, once we had notice of the decision a couple weeks ago, we asked [a human resources specialist] to make the calculations and we had intended to send the checks last week before the trial started. But since I was in another trial . . . , I never got it done." Counsel represented to the trial court that the District would pay appellants any additional amounts due, with interest at 10 percent, and would also credit their service records with any additional days that might be due. The court incorporated the former representation into its statement of decision, with an express finding that "[t]he calculation of petitioners' sick leave was made in good faith. It proved to be incorrect. The proper method of calculation was clarified in 2009. . . . There was no evidence presented to the court that the erroneous method was used only for [appellants]. To the contrary, this method was used for all employees, until the Court of Appeal clarified the issue."

2. Analysis

Appellants construct a highly technical argument based on the District's good faith miscalculation of their available leave time. The argument goes like this: The board resolution listed two reasons for appellants' separations from employment: the "exhaustion of entitlement to all paid leave" and the "abandonment and/or refusal to resume the duties" of their positions. Since the "exhaustion of sick leave" reason was "admittedly bogus" because of the miscalculation, and appellants did not refuse to resume the duties of their *original* positions, they must have been terminated for abandonment of *those* positions, since they could not possibly have been terminated for failing to "resume" their newly assigned positions, which they "never even assumed (let

alone 'abandoned')." Since Board Policy 5310 (causes for disciplinary action) lists "abandonment of position" as a "cause" for dismissal, appellants must have been terminated "for cause" and without due process, and that means they are entitled to reinstatement in their *original* positions.

Appellants' argument that the miscalculation compels an after-the-fact conclusion that they must have been terminated for abandoning their positions cannot be supported. The trial court made an express *factual* finding that "the terminations of Ms. Lawrence and Ms. Culver were not disciplinary." Implicit in that factual finding is another factual finding that they were released from employment because they had run out of leave, not because they had abandoned their positions. Substantial evidence supports both findings. The District's December 21, 2007 letters informed appellants that their entitlement to paid leave would be exhausted and that they would be released from employment and placed on a 39-month reemployment list unless they obtained written releases from their doctors and returned to work before January 9, 2008. As they acknowledged in their writ petition, those letters stated that they would be "welcomed back" as soon as they were released to return to work—language that surely would have been omitted had the District intended to fire them for cause. The District's director of human resources testified that appellants were not "terminated." "I would refer to it more as a separation than termination. It is not termination in a punitive sense. [¶] . . . [¶] . . . There was cause to separate them because they were out of leave; and put them on a 39-month re-employment list."

Although the District certainly could have terminated appellants for abandoning their positions, we find no evidence in the record to support appellants' contention that it did so. Had the District intended to terminate appellants, we believe it would have terminated them long before January 8, 2008. It surely had grounds to do so. Culver admitted at trial that she had never seen her doctor but had instead obtained her succession of notes, each of which covered about a month's time, from the doctor's

assistant. The notes were unqualified, yet both appellants consistently maintained, from the beginning of their dispute with the District, that they were not too sick to report to their *former* assignments. As Lawrence put it in her December 31, 2007 response to the District's letter warning that her leave was about to run out, "I have *always* been willing, and remain willing, to return to my position as the Senior Executive Assistant to the President/Superintendent of Hartnell College." Similar sentiments can be inferred from Culver's December 31, 2007 response to the District.

We are not persuaded by appellants' belated argument, unaccompanied by any citation of authority, that a Court of Appeal decision a year after their separations from employment, clarifying the proper method of calculating leave, can transform the *facts* underlying those separations, which were neither disciplinary nor "for cause."

Appellants assert that since they were released from employment before their available leave had expired, the trial court should have ordered their reinstatement. We disagree.

"In a petition for writ of mandate brought pursuant to Code of Civil Procedure section 1085, . . . the petitioner bears the burden of pleading and proving the facts on which the claim for relief is based. (Code Civ. Proc., § 1109; Evid. Code, § 500.)" (*California Correctional Peace Officers Assn. v. State Personnel Bd*. (1995) 10 Cal.4th 1133, 1153-1154.) Here, it was appellants' burden to prove, among other things, that their separations from employment were premature because their available leave time extended beyond the dates specified in their doctors' notes.

But the trial left that question unanswered. Lawrence testified without elaboration that she had leave beyond the date specified in her doctor's note. Her husband's February 14, 2008 letter to the District, which was marked as an exhibit at trial, made seemingly contradictory assertions, stating at one point that she was owed an additional three days' differential wages and, at another point, that she was owed an additional 68 days' differential wages. Lawrence was not questioned about these contradictory

assertions. A three-day discrepancy would not have extended her leave beyond January 14, 2008, the last day specified in her doctor's note, while a 68-day discrepancy may have. The trial court could reasonably have accepted either of these conflicting assertions. (*Lake*, *supra*, 16 Cal.4th at p. 457 ["'"Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.]"'"].)

Culver admitted on cross-examination that her doctor's note extended through January 31, 2008, 16 days beyond the date stated in the District's December 21, 2007 letter. She claimed that in May 2007, she had "83.72 sick leave days." However, she was not asked whether she had used any of those before July 25, 2007, and it was unclear whether her number included differential as well as regular "sick leave days."[13] The trial court could reasonably have rejected Culver's conclusory testimony, which raised more questions than it answered.

Appellants also proffered the testimony of Louann Raras, a human resources specialist for the District whose duties included keeping track of how much leave employees were entitled to and how much they had used. But her testimony did not resolve the question of when appellants' leave would have run out. She had not done the challenged leave calculations. Instead, the District's director of human resources "figured it out herself and asked me if it looked right."

Raras described how the District computed leave before and after *Colton*, explaining in general terms that the method *Colton* prescribes would have given appellants more time and more money, since it requires that the various types of leave be paid in sequence: first, sick leave at full pay, then 100 days' differential leave at half pay,

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[13] Raras explained that although employees do not accrue section 88196 differential pay the way they accrue regular sick leave or vacation time, they are entitled to 100 days' differential leave each school year.

then vacation and other leave at full pay.[14] The original leave balances, Raras explained, were calculated using the "old" (pre-*Colton*) method. After *Colton* clarified the law, she had been asked to *recalculate* appellants' leave. She did not have her calculations with her at trial, however. Moreover, "I didn't look at the calendar. I looked at the days and how much money they would be due." Raras estimated that for Lawrence, "[i]t was beyond January" and about $4,000. She could not recall what Culver was due, or even whether she had more or less leave time than Lawrence. Lawrence, however, asserted in her December 31, 2007 letter to the District that her "entitlement to paid leave was significantly greater than [Culver's]."

None of this evidence and testimony conclusively established that appellants' available leave extended beyond the dates specified in their doctors' notes. The trial court impliedly concluded that appellants did not establish their entitlement to reinstatement[15] when it denied the petition, and it ordered the District to recalculate the leave and pay appellants any additional amounts due, with interest.

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[14] The sequence Raras described appears to be inconsistent with the statement in *Colton* that "vacation leave and differential leave should be deducted separately, or consecutively, possibly entitling [the employee] to additional days of differential leave *after her sick leave and vacation leave were exhausted.*" (*Colton*, *supra*, 170 Cal.App.4th at p. 863, italics added.)

[15] The cases appellants summarily cite do not establish their entitlement to reinstatement. In *Barthuli*, the California Supreme Court affirmed the trial court's denial of a writ of mandate to compel a school district to reinstate an associate superintendent, explaining that mandamus will not lie where the petitioner possesses an adequate remedy at law, as Barthuli did. (*Barthuli*, *supra*, 19 Cal.3d at p. 720.) In dictum, the court noted that "[r]einstatement has been recognized as an appropriate remedy when an employee has been discharged in violation of his statutory rights [citations] . . . [citations]." (*Ibid.*) Barthuli had not been discharged in violation of his statutory rights, however, and was not entitled to reinstatement, because administrative and supervisory personnel do not possess statutory rights in their positions. (*Id.* at p. 721) Similarly here, appellants were not discharged in violation of their statutory rights, because they possessed no right to their former assignments. (*Dobbins*, *supra*, 75 Cal.App.4th at p. 131.) *Barthuli* does not help them. *Zike v. State Personnel Bd.* (1983) 145 Cal.App.3d 817 (*Zike*), disapproved in *Coleman*, *supra*, 52 Cal.3d at p. 1123, fn. 8, does not help them either. In *Zike*, the court

We think the trial court reached the correct decision, particularly since appellants have never so much as suggested that, had the District calculated their leave correctly, they would have changed their minds and accepted their new assignments. On the contrary, they made it clear from the beginning that while they were available to return to their *former* positions, they would not accept their new assignments until they were afforded hearings on the propriety of their "demotions." Lawrence testified that she would have accepted her new assignment *had she had "an opportunity for a hearing . . . .*" (Italics added.) Culver stated that she repeatedly requested a hearing and *had there been one*, she would have accepted her new assignment. "I truly believed that I deserved this hearing."

Just a week before they were separated from employment, appellants reiterated their unequivocal position that they would not accept their new assignments unless they were afforded hearings. In her December 31, 2007 letter to the District, Culver stated, "I cannot believe you are allowing this to happen . . . without any form of a hearing. I am requesting an opportunity to have the manner in which I have been treated . . . evaluated by an impartial board or hearing officer . . . ." Lawrence's December 31, 2007 letter similarly requested that she remain on leave and that her "rights and benefits be continued without interruption *until such a hearing can take place*." (Italics added.)

Since appellants failed to prove that they were terminated "for cause" or before their leave ran out, the trial court correctly concluded that they were not entitled to pre-separation notice and hearings or to reinstatement. (§§ 88013, subd. (b); 88001, subds. (e) & (h); see *Trotter v. Los Angeles County Bd. of Education* (1985) 167

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held that due process protections must be extended to those terminated pursuant to former Government Code section 19503 (now Government Code section 19996.2), which provided that an absence without leave for more than five consecutive working days, whether voluntary or involuntary, is an automatic resignation from state service. (*Zike*, at p. 821.) Here, unlike in *Zike*, appellants were not absent without leave, nor were their separations from employment disciplinary or punitive.

Cal.App.3d 891, 896 [“placement of appellant on the 39-month list was not disciplinary and no hearing is required”].) Thus, there was no due process violation.

III. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

_____
Duffy, J.

Trial Court:	Monterey County Superior Court
Trial Judge:	Honorable Lydia Villarreal
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